90-1741

Supreme Court, U.S.
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No. 90-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BAYERISCHE HYPOTHEKEN- UND WECHSEL- BANK AG
and
DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,
Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany, and EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether Section 53-7-91 of the Official Code of Georgia Annotated, as applied in this case to require the administrator of a Georgia estate to pay in full all Georgia claimants before making any distribution to German claimants regardless of the statutory priority of their claims, violates the equal protection clause of the fourteenth amendment to the United States Constitution by discriminating against the German claimants solely on the basis of their alienage.

2. Whether the estate distribution plan set forth in the superior court's order as to which review is sought interferes with the foreign relations of the United States and violates the Treaty of Friendship, Commerce and Navigation between the United States and Germany by discriminating against the German creditors of the estate solely on the basis of their alienage.

3. Whether *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908), should be overruled as inconsistent with this Court's equal protection jurisprudence.

LIST OF PARTIES

The parties to the proceedings below were:

(1) Appellant Bayerische Hypotheken- und Wechsel- Bank AG ("Hypo Bank")*;

(2) Appellant Dr. Bruno M. Kübler in his capacity as Trustee in Bankruptcy for Westaufbau GmBH and Westaufbau Grundbesitzanlagen GmBH & Company KG;

(3) Appellee Dr. Klaus Hubert Görg in his capacity as the German Trustee in Bankruptcy; and

(4) Appellee Edgardo Parungao, Administrator CTA of the Georgia Probate Estate of Günter Kaussen.

The respondents before this Court are:

(1) Dr. Klaus Hubert Görg in his capacity as the German Trustee in Bankruptcy; and

(2) Appellee Edgardo Parungao, Administrator CTA of the Georgia Probate Estate of Günter Kaussen.

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* Pursuant to Rule 28.1 Petitioner Hypo Bank lists A.B.D. Securities Corporation as its only United States based affiliate.

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BAYERISCHE HYPOTHEKEN- UND WECHSEL- BANK AG
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DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany, and EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners Bayerische Hypotheken- und Wechsel- Bank AG ("Hypo Bank") of Munich, Germany, and Dr. Bruno M. Kübler ("Kübler") in his capacity as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG, as creditors of the estate of Heinz Günter Kaussen, deceased ("Estate"), respectfully request that a writ of certiorari issue to review the January 10, 1991, rulings by the Supreme Court of Georgia affirming without opinion the order of the Superior Court of Fulton County, Georgia dated April 4, 1990.

OPINIONS BELOW

Reprinted copies of the Findings of Fact and Conclusions of Law ("Findings") and Judgment of the United States Bankruptcy Court for the Northern District of Georgia in *In re Goerg*, Case No. A86-04341-ADK, dated July 31, 1989, are attached hereto as Appendices A and B.

A reprinted copy of the Order of the Superior Court of Fulton County, Georgia, dated April 4, 1990, ("Order") is attached hereto as Appendix C.

A reprinted copy of the Judgment of the Supreme Court of Georgia, dated January 10, 1991, affirming without opinion the lower court's Order, is attached hereto as Appendix D.

Reprinted copies of the denials of Petitioners' Joint Motion for Reconsideration by the Supreme Court of Georgia, dated January 30 and 31, 1991, are attached hereto as Appendices E and F.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 10, 1991. Petitioners' timely joint motion for reconsideration was denied by separate orders on January 30 and 31, 1991. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourteenth amendment, United States Constitution.

> "[N]o state shall make or enforce any law which shall ... deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." U.S.C.A. Constitutional Amendment 14, Section 1.

2. Section 53-7-91 of the Official Code of Georgia Annotated. Claims against the estate of a decedent shall rank in the following order:

> (1) Year's support for the family;
>
> (2) Funeral expenses, whether or not the decedent leaves a surviving spouse, in an amount which corresponds with the circumstances of the decedent in life, including physician's bill and expenses of the last sickness. If the estate is solvent, the administrator or executor is authorized to provide a suitable protection for the grave of the decedent;
>
> (3) The necessary expenses of administration;
>
> (4) Unpaid taxes or other debts due the state or the United States;

(5) Debts due by the decedent as executor, administrator, or guardian for an estate committed to him as such, or any debt due by the decedent as trustee, when he has had actual possession, control, and management of the trust property;

(6) Judgments, mortgages, and other liens created during the lifetime of the decedent, to be paid according to their priority of lien. Mortgages and other liens on specific property shall be preferred only to the extent of such property;

(7) Debts due for rent;

(8) All liquidated demands, including foreign judgments, dormant judgments, bonds, all other obligations in writing for the payment of money, promissory notes, and all debts the amount due on which was fixed and ascertained or acknowledged in writing prior to the death of the decedent; and

(9) Open accounts.

A copy of the Treaty of Friendship, Commerce and Navigation between the United States and Germany, dated October 29, 1954, is attached hereto as Appendix G.

STATEMENT OF THE CASE

> "It is only by not paying our bills that one can hope to live in the memory of the commercial classes."
>
> -- Oscar Wilde

A. The Kaussen Probate Proceedings.

Heinz Günter Kaussen ("Kaussen"), a German landlord known variously as *"Der Miethai"* (the rent shark) and the "German Howard Hughes," died a suicide on April 14 or 15, 1985, in Cologne, Germany.[1] During his lifetime, Kaussen had amassed substantial assets (mostly apartment houses and office buildings in Germany, Canada, California and Georgia) but also even more substantial debts. At his death, Kaussen's worldwide debts, including more than DM 129,000,000 (roughly $76 million[2]) owed to Hypo Bank, exceeded his assets by more than DM 121,000,000.

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[1] *Chicago Tribune*, April 18, 1985, at C-14. *See also Los Angeles Times*, April 16, 1985, part 2, at 6. Just as Kaussen's life and sordid death brought him notoriety in the popular press, the legal proceedings involving his estate have repeatedly been featured in international legal periodicals and the case is followed with interest in Europe, where it has been the subject of at least one symposium. *See, e.g.*, Hirte, *Der Kaussen-Kankurs vor US-amerikanischen Gerichten*, Zeitschrift für Wirtschaftsrecht 1493 (1989); Hanisch, *Erlöse aus der Teilnahme an einem ausländischen Parallel-Insolvenzverfahren - Ablieferung an die inländische Konkursmasse oder Anrechnung auf die Inlandsdividende?*, 10 Zeitschrift für Wirtschaftsrecht 273 (1989); and *Re Kaussen Estate*,64 Can. Bankr. Rep. 97 (1987).

[2] For comparison purposes, the Deutsche Mark closed on April 18, 1991, at 1.7040 Marks per U.S. dollar (i.e., 1 DM = 58.69 cents). The Wall Street Journal, April 19, 1991, at C-10.

Within weeks of Kaussen's death, his common-law wife, Ingeborg Skowronek,[3] initiated separate probate proceedings in Cologne, Montreal, San Francisco and Atlanta. Six months later in Cologne, the Kaussen Estate was adjudged bankrupt[4] and respondent Dr. Klaus Hubert Görg, a German lawyer, was appointed the German Trustee in Bankruptcy. To date there have been no distributions to unsecured creditors, and there is a substantial question as to whether anything will remain after payment of German taxes.[5]

While, and indeed before, proceedings commenced in Germany, the probate proceedings in Georgia and California began the orderly process of mustering and liquidating the Estate's considerable assets within each jurisdiction. Claims were filed (including claims by each of the Petitioners, who appeared in this country for that purpose, and claims on behalf of two other German banks); properties were sold; secured creditors and some small unsecured creditors were paid; and each estate ended up with approximately $6 million to $8 million in liquid assets before payment of fees and distribution to unsecured creditors (such as Petitioners).

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[3] By a three-sentence will dated January 19, 1963, Kaussen purportedly left his entire estate to Mrs. Skowronek except for a house that he left to his secretary.

[4] This had the effect of depriving Mrs. Skowronek of her claim. She promptly decamped to Montreal, where she remains.

[5] Petitioners have argued against delivering the Georgia and California estates to Dr. Görg on the grounds that such delivery would constitute a preferential disposition of assets to the German taxing authorities, contrary to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964), and *Her Majesty, Queen in Right, etc. v. Gilbertson*, 597 F.2d 1161, 1163-66 (9th Cir. 1979). German law has long

B. Proceedings in the United States Bankruptcy Courts.

Not content with his uncertain standing in the Georgia and California probate proceedings as an agent for creditors, in June 1986 Dr. Görg attempted to gain control of the Georgia and California estates by filing petitions in the United States Bankruptcy Courts for the Northern District of Georgia and the Northern District of California for ancillary administration of the estates pursuant to Section 304 of the Bankruptcy Code. 11 U.S.C. § 304. (Section 304 permits foreign bankruptcy trustee to petition United States Bankruptcy Court in aid of foreign proceedings.) The California bankruptcy court abstained, so Dr. Görg took no appeal there, but when the Georgia bankruptcy court dismissed his petition on jurisdictional grounds Dr. Görg appealed to the United States District Court for the Northern District of Georgia, which affirmed, and to the United States Court of Appeals for the Eleventh Circuit, which reversed.[6]

Upon remand, the Georgia bankruptcy court held a two-day trial in June 1989 and determined not to commence a Section 304 proceeding. In so doing, the bankruptcy court entered findings of fact and conclusions of law (the

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recognized the same principle. *Judgment of April 27, 1912*, Oberlandesgericht, Hamm, Ger., 25 Rechtsprechung der Oberlandesgericht 333. The United States Bankruptcy Court in Atlanta found that, if theGeorgia and California estates were to be turned over to Dr. Görg, "most and perhaps all of these American assets would be paid to the West German taxing authorities to satisfy West German tax claims, to the exclusion of other creditors * * *." Findings ¶ 23, Appendix at 10a. Nevertheless, respondent Dr. Görg has sought both in the bankruptcy court, where he was rebuffed, and in the state courts of Georgia, where he was successful so far, to effect such a turnover of American assets.

[6] *In re Goerg*, 64 Bankr. 321 (Bankr. N. D. Ga. 1986), *rev'd.*, 844 F.2d 1562 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989).

"Findings," Appendix A, at 1a) in which it rejected Dr. Görg's contention that his commission under German law gave him universal authority to obtain control of all Kaussen's assets worldwide, found that German law respected foreign parallel collective proceedings such as the Georgia probate proceedings, and found that turning over the Georgia probate estate to Dr. Görg would mean that "most and perhaps all of these American assets would be paid to the West German taxing authorities to satisfy West German tax claims, to the exclusion of other creditors * * *." Findings ¶¶ 15, 20-25, Appendix at 7a-11a.

Dr. Görg appealed the bankruptcy court's decision to the United States District Court for the Northern District of Georgia, which dismissed the appeal as non-reviewable under 11 U.S.C. § 305(c) as it stood before its amendment by section 309 of the Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089.[7] Dr. Görg's appeal from that dismissal is pending in the United States Court of Appeals for the Eleventh Circuit, where it was argued on March 11, 1991.

C. The Order At Issue.

In the midst of his appeal to the District Court, Dr. Görg returned to the Georgia state courts and moved the Superior Court of Fulton County, Georgia, for an order directing that creditors who are United States citizens be paid first and in full,[8] after which the remainder of the Georgia Estate would be turned over to Dr. Görg. The Superior Court, citing section 53-7-91 of the Official Code of Georgia Annotated ("O.C.G.A."), and without hearing any evidence on the validity of the various claims involved,

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[7] *See generally Matter of Axona Intern. Credit & Commerce Ltd.*, 924 F.2d 31, 33-36 (2d Cir. 1991).

[8] Such claims by American citizen creditors total $1.09 million, more or less.

issued the Order directing Administrator CTA Parungao to pay all American creditors in full and then turn over the balance of the estate ($8 million, more or less) to Dr. Görg "for determination under German law of the claims of all German creditors, including the claims of the German creditors who have filed in Georgia." Order, Appendix at 17a. The Order mandated an absolute preference in favor of the American creditors even though the claims of the German creditors (such as Petitioners) were of equal or greater priority.

Petitioners appealed to the Georgia Supreme Court, arguing, among other things, that: (1) the Order violated O.C.G.A. Section 53-7-91, which prescribes the pro rata payment of all creditors of an estate having claims of equal priority; (2) the Order violated the fourteenth amendment to the United States Constitution by discriminating against nonresident creditors solely on the basis of their alienage; and (3) the Order violated the Treaty of Friendship, Commerce and Navigation between the United States and Germany. The Georgia Supreme Court affirmed without opinion and denied Petitioners' motion for reconsideration. The affirmance endorses the preferential treatment of local creditors over foreign creditors, and has the effect of holding that such treatment does not violate the fourteenth amendment to the United States Constitution or the Treaty of Friendship, Commerce and Navigation between the United States and Germany.

REASONS FOR GRANTING THE WRIT

> A grant of priority rights to local creditors, whatever form it may assume, contradicts the principle of equality. It is legal isolationism, as incompatible with international commerce as economic or political isolationism. All countries are interested in the maintenance of equality among all creditors as a condition for

> international commercial relations. Protection of equality, therefore, is service to a common cause.

Nadelmann, *Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination?* 91 U. Pa. L. Rev. 601, 624 (1943).

Over two decades ago this Court observed, in striking down the discriminatory aspects of the probate law of Oregon, that the statute:

> [H]as a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems. The Oregon law does indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.

Zschernig v. Miller, 389 U.S. 429, 441 (1968). Today, two decades later, foreign investment in the United States totals almost $1.8 *trillion*, an increase of more than 700% since 1975.[9] It is no exaggeration to say that the treatment of aliens' claims is an issue of significant economic importance. But even if this were not a case that has attracted a great deal of international attention (see fn. 1 above), the unjustifiable discrimination against aliens, the lower courts' disregard of this Court's equal protection jurisprudence, the interference with foreign relations, and the violation of the United States' treaty obligations at issue here would warrant this Court's attention.

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[9] R. Scholl, *The International Investment Position of the United States in 1988*, Survey of Current Business, U.S. Department of Commerce, Bureau of Economic Analysis, 43 (June 1989).

ARGUMENT

A. The Application Of The Georgia Statute To Require That Domestic Claimants Are Paid In Full Before German Claimants Are Paid Anything Is A Forbidden Discrimination Based On Alienage.

A state statute neutral on its face but interpreted to permit exclusion of otherwise qualified claimants on the basis of alienage violates the fourteenth amendment.[10]

It is well settled that discrimination based on alienage violates the due process and equal protection clauses of the fifth and fourteenth amendments to the United States Constitution. *See Wong Wing v. United States*, 163 U.S. 228 (1896) (due process clause of fifth amendment applicable to aliens); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-374 (1886) (equal protection clause of fourteenth amendment applicable to aliens). Classifications based on alienage are "inherently suspect" and subject to strict judicial scrutiny, under which they can only be upheld if proved necessary to promote a "compelling state interest." *Graham v. Richardson*, 403 U.S. 365, 375 (1971). *See also Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

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[10] This Court has repeatedly held that the "state action" requirement is satisfied where, as here, a state court order commands a private person to take actions that would violate the United States Constitution if undertaken by the state. *See Shelley v. Kraemer*, 334 U.S. 1, 13-20 (1948). The Order in this case, which directs the administrator to make no distributions to German creditors of the Estate, patently constitutes an affirmative judicial requirement of discrimination based on alienage. As such, the Order constitutes state action, against which the German creditors are entitled to fourteenth amendment protection. *Cf. Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 488 (1988).

To be sure, this Court has sometimes found such a compelling interest, as in its "political function" cases involving governmental employees. *E.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982); *Ambach v. Norwick*, 441 U.S. 68, 72-80 (1979); *Foley v. Connelie*, 435 U.S. 291, 294-300 (1978).[11] But no such compelling interest is even remotely involved in this case. Georgia's interest here is less compelling than Texas' interest in ensuring that its notaries public know something of Texas law[12], Texas' interest in preserving its "limited resources for the education of its lawful residents,"[13] or California's interest in conserving a scarce resource by limiting commercial fishing licenses to persons eligible for citizenship[14]--all interests that this Court has found inadequate to justify discrimination against aliens.

There can be no question that Petitioners, as nonresident aliens claiming property within the United States, are entitled to equal protection of the laws. As Judge Friendly explained in *Sardino v. Federal Reserve Bank of New York*:

> The Government's second answer that "The Constitution of the United States confers no rights on nonresident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was

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[11] *See United States v. Verdugo-Urquidez*, __ U.S. __, 110 S.Ct. 1056, 1064 (1990), where the Court held that the fourth amendment, unlike the fifth, does not apply to property owned by a non-resident alien and located in a foreign country; the opinion distinguishes cases in which the alien comes "within the territory of the United States and developed substantial connections with this country."

[12] *Bernal v. Fainter*, 467 U.S. 216, 227 (1984).

[13] *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

[14] *Takahashi*, 334 U.S. at 418.

> made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of Government within our borders--and even to some without. This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds. In *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92, 51 S.Ct. 229, 75 L.Ed. 473 (1931), the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation - even when his government was no longer recognized by this country. And the Court has declared unequivocally, with respect to nonresident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment."

361 F.2d 106, 111 (2d Cir. 1966) (citations and footnote omitted).

This Court has held that the equal protection clause of the fourteenth amendment applies to all persons 'within the jurisdiction' of the United States, including nonresident aliens. *Matthew v. Diaz*, 426 U.S. 67 (1976). *See Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950). Hypo Bank is clearly 'within the jurisdiction' of the United States because it has long maintained an office in New York City. Further, by appearing in the courts of the United States and of Georgia and submitting to their jurisdiction, both Petitioners have placed themselves 'within the jurisdiction' of the United

States so as to be entitled to Constitutional protection. As this Court pointed out in a case presenting an analogous issue:

> The [equal protection] clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws", meaning, of course, the protection of laws applying equally to all in the same situation. The words 'within its jurisdiction' are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking.

Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544, 550 (1923). Thus, Hypo Bank's physical presence in this country and both Petitioners' claims against Kaussen's Georgia Estate bring them 'within the jurisdiction' of the United States and entitle them to fourteenth amendment protection.

B. The Georgia Order Interferes With Foreign Relations and Violates the Treaty Obligations of the United States.

Petitioners further contend that the Order violates the Treaty of Friendship, Commerce and Navigation entered into between the United States and Germany on October 29, 1954 (the "Treaty," Appendix at 22a). The Treaty mandates that both nations accord fair and equitable treatment to each other's nationals at all times (Article I,

paragraph 1), that property of each other's nationals shall not be taken, except for the public benefit and in accordance with due process and just compensation (Article V, paragraph 4), and that the nationals of each country shall receive equal treatment in the courts of the other country in pursuit and defense of their legal rights (Article VI, paragraph 1).[15]

The Order, as affirmed by the Georgia Supreme Court, denies Petitioners and the other German creditors of the Estate the right to participate pro rata in any distribution to their class of claims under the Georgia statute. As such, the Order violates the Treaty in several ways. First, the

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[15] Two years after the execution of the Treaty, Herman Walker, Jr., the draftsman and chief American negotiator thereof, commented on the purpose and effect of the Treaty as follows:

> [T]he basic rule to govern the conduct of such activities has long since been settled, in United States treaty practice, as "national treatment": that is, equality of treatment as between the alien and the citizen of the country. The former is thus entitled freely to carry on his chosen business under conditions of non-discrimination, and to enjoy the same legal opportunity to succeed and prosper on his merits as is allowed citizens of the country. It has become settled, that he and his property shall receive ... equal protection.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 232 (1956). *See* Department of State Airgram A-105, January 9, 1976 (recognizing that Mr. Walker was responsible for formulation and negotiation of post-war Friendship, Commerce and Navigation treaties).

Order patently fails to grant the German creditors fair and equal treatment, as required by Article I, paragraph 1 of the Treaty.[16] Second, the Order denies the German creditors who have properly filed claims in Georgia equal access to Georgia courts in pursuit of their rights, in violation of Article VI, paragraph 1 of the Treaty.

This Court addressed a similar conflict between state probate law and a United States treaty in *Zschernig v. Miller*, 389 U.S. 429 (1968). In *Zschernig*, this Court was faced with an Oregon statute that regulated the ability of a nonresident alien to inherit property from an Oregon decedent. A citizen and resident of East Germany, who was held by the Oregon Supreme Court to be ineligible from inheriting the personalty of the decedent, appealed to this Court on the grounds that the Oregon statute violated the Treaty of Friendship, Commerce and Consular Rights of 1923 between Germany and the United States. This Court held the Oregon statute invalid, stating that when state probate law conflicts with a treaty, the state "must bow to superior federal policy." *Id.* at 441. The Court further held that if there are to be restraints on the ability of a nonresident alien to participate in United States estate administrations, such restraints must be provided by the federal government. *Id.*

Just as this Court struck the Oregon statute regulating the ability of a nonresident alien to inherit from an Oregon estate, so too should this Court strike down the Georgia court's Order mandating preferential treatment of local creditors over nonresident alien creditors asserting claims

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[16] As noted in the Bankruptcy Court's Findings, German law does not allow such discrimination on the basis of alienage. Findings, ¶24, Appendix at 10a.

of equal dignity. With foreign investment in the United States now approaching $1.8 trillion, the ability of a state court or legislature to make foreign policy regulating the payment of the claims of nonresident aliens is a significant issue that needs to be re-addressed by this Court through this case.

C. *Disconto Gesellschaft v. Umbreit* Should be Overruled.

In an earlier age, when equal-protection arguments were sometimes dismissed as "the usual last resort of constitutional arguments"[17] and now-unthinkable distinctions based on alienage and race were sincerely pressed,[18] the Court held that a state could, in resolving competing claims to a fund, prefer local creditors over alien creditors. *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908). This Court should re-examine that holding, which can no longer be reconciled either with this Court's treatment of aliens under the equal protection clause or with the Bankruptcy Code.

The facts of *Disconto* warrant brief mention. Gerhard Terlinden, alias Theodor Graefe, spent the first six months of 1901 uttering forged stock certificates to a number of unsuspecting victims, including the Disconto Gesellschaft ("Disconto") of Berlin,[19] then fled to Wisconsin, where in

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[17] *Buck v. Bell*, 724 U.S. 200, 208 (1927) (Holmes, J.).

[18] *See, e.g., Berea College v. Kentucky*, 221 U.S. 45 (1908) (Court found no equal protection violation in "An Act to Prohibit White and Colored Persons from Attending the Same School").

[19] *See generally Terlinden v. Ames*, 184 U.S. 270 (1902).

July, 1901, he deposited $6,420 in German money in the First National Bank of Milwaukee.[20] The next month Terlinden was arrested and held for extradition back to Germany. At this point, Disconto filed a tort action in Wisconsin against Terlinden, and the Umbreit of this story, attorney A.C. Umbreit, appeared for Terlinden.[21]

Meanwhile, back in Germany, bankruptcy proceedings against Terlinden began. Disconto was appointed a member of the committee of creditors, only to have its claim disallowed in the first days of 1902.[22] Nonetheless, Disconto agreed with the German trustee in bankruptcy to place into the German bankruptcy estate of Terlinden anything it recovered in Milwaukee.

Attorney Umbreit went on representing Terlinden both in his habeas corpus proceedings before this Court[23] and in Disconto's tort action. Terlinden lost the former in February 1902 and the latter in February 1904, when Disconto obtained a judgment for $94,145.11. The next month Umbreit sued Terlinden for attorney's fees and obtained a default judgment. Both judgments--Disconto's and Umbreit's --went unsatisfied, so both attempted to garnish the account at the First National Bank of Milwaukee.

The Wisconsin trial court rendered a judgment giving priority to Disconto's levy, but the Wisconsin Supreme Court reversed.[24] This Court affirmed the Wisconsin Supreme Court, holding that neither the doctrine of comity nor the

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[20] *Disconto*, 208 U.S. at 575.

[21] *Id.* at 576.

[22] *Terlinden*, 184 U.S. at 276.

[23] *Disconto*, 208 U.S. at 575-76.

[24] *Id.* at 577. *Disconto Gesellschaft v. Terlinden*, 127 Wis. 651, 106 N.W. 821 (1906)

Treaty of Commerce and Navigation of May 1, 1828, between Prussia and the United States (8 Stat. 378, T.S. 294) provided any reason to set aside:

> [T]he constant practice not to recognize assignments for the benefit of creditors outside the State, where the same come in conflict with the rights of domestic creditors seeking to recover their debts against local property. This is the doctrine in force against natives of the country residing in other states, and it is this doctrine which has been applied by the Supreme Court of Wisconsin to foreign creditors residing in Germany.

Disconto, 208 U.S. at 582.[25]

Since 1908 two controlling events have overtaken *Disconto* and drained it of whatever vitality it once had: first, the evolution of this Court's three-tiered equal protection standard and, second, the evolution and amendment of Title 11, United States Code, most notably through the addition of sections 304 and 305 by the Bankruptcy Reform Act of 1978.

Equal Protection. *Disconto* was based on the proposition that international comity is discretionary so that, in the absence of an explicitly contrary legal obligation, a state is free to prefer the claims of its citizens over the competing claims of aliens. International comity is still discretionary,[26] but equal protection doctrine has come a

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[25] *Id.* at 582. In particular, this Court denied that the 1828 Treaty gave Disconto any right not to be disadvantaged on account of its alienage. It is doubtful that this Court would reach the same result today. As noted in part B of this argument, the 1954 Treaty, which replaced the 1828 Treaty, mandates equal treatment and equal access to the courts.

[26] This is elementary. *See, e.g.*, J.G. Starke, *Introduction to International Law* 19-20 (9th ed. 1984).

long way since 1908. The "constant practice" referred to in *Disconto* came to an end, at least domestically, in 1923 with this Court's decision in *Kentucky Finance Corp.*, 262 U.S. at 550. Since 1923, however, the practice of discriminating against alien creditors, though just as suspect, has never received this Court's attention despite the evident impossibility of reconciling it with the "strict scrutiny" that this Court today gives to laws that discriminate against aliens. *E.g., Plyler*, 457 U.S. at 227. In *Disconto*, this Court, based on the absence of any statute or treaty specifically prohibiting the distinction, permitted Wisconsin to prefer its own citizen over an alien in a creditor's rights matter of no significance to the governance of the state. Today, such a distinction could not possibly pass constitutional muster.

The Bankruptcy Code. Even before the 1978 reform act, the bankruptcy laws of the United States did not countenance discrimination against aliens of the type permitted in Disconto. In the most recent appellate opinion to cite *Disconto*, *Banque de Financement v. First Nat. Bank of Boston*, 568 F.2d 911, 921 (2d. Cir. 1977) (*"Finabank"*), the bankruptcy court, followed by the district court, had cited *Disconto* for the proposition that the Bankruptcy Act endowed it with discretion to dismiss United States bankruptcy proceedings ancillary to foreign domiciliary proceedings when necessary in order to give American claimants priority over foreign creditors. The Court of Appeals reversed, holding:

> Section 2a(22)[27] was not intended to be the instrument by which jurisdiction over a foreign domiciliary grounded in § 2a(1) could be undercut for the purpose of validating preferential transfers to United States nationals. Section 2a(22) was enacted as an administrative reform. It was designed to avoid needless duplication of efforts by courts and creditors in those cases where an ancillary proceeding in this country could be coordinated with or entirely dismissed in favor of a domiciliary proceeding abroad.

Finabank, 568 F.2d at 921

The Second Circuit did not address *Disconto* specifically (merely noting that the bankruptcy court had cited it); instead, it held, in effect, that section 2a(22) of the Bankruptcy Act had overtaken *Disconto*. *Disconto* should not be resuscitated to control this case.

The legislative history of the adoption of Section 304 of the Bankruptcy Code--which allows representatives of foreign bankruptcy estates to engage the provisions of the Code to ensure equal treatment of foreign and domestic creditors--is instructive as to the modern status of the doctrine of comity. During the decade preceding adoption of the Bankruptcy Code, creditor equality had replaced comity as the guiding force in American bankruptcy courts' treatment

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[27] Bankruptcy Act section 2a(22) permitted bankruptcy courts to:

> Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States.

11 U.S.C. § 2a(22) (1970).

of foreign claimants. *See, e.g., Finabank*, 568 F.2d at 911; and *Israel-British Bank Ltd. v. Federal Deposit Insurance Corp.*, 536 F.2d 509 (2d Cir. 1976). In the early drafts of Section 304, comity was completely omitted from the list of factors to be used by courts in evaluating whether to recognize foreign claims.[28] Similarly, comity was disregarded as a relevant consideration in both the initial House and Senate versions of Section 304.[29] It was not until the final version of the bankruptcy reform legislation that comity was even included as one of six factors to be considered in deciding whether to commence a Section 304 proceeding.[30] Clearly, then, the enactment of Section 304 in effect dethroned comity--which had been the sole foundation for the *Disconto* decision--in favor of the objective of creditor equality as the primary mission of courts and Congress in addressing claims of foreign creditors.[31] The time has come to overrule *Disconto*. It is, quite simply, no longer acceptable for states to discriminate against claimants on the basis of alienage. The *Finabank* court recognized this, as does this Court's modern equal protection doctrine. Whatever the rule in 1908, today alien creditors present in the United States are entitled to the equal protection of the laws.

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[28] Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137 (Part II), 93rd Cong., 1st Sess. 69-71 (1973)(hereinafter "Commission Report").

[29] *See* H.R. 8200, 95th Cong., 1st Sess. § 304 (1977); S. 2266, 95th Cong., 2d Sess., § 304 (1978).

[30] 124 Cong. Rec. H 32391-32420 (Sept. 28, 1978).

[31] *See* Commission Report at 71.

CONCLUSION

For the reasons stated, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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Appendix A

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER
	:	
KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the ESTATE OF HEINZ GUENTER KAUSSEN, pursuant to the law of the Federal Republic of Germany,	:	A86-04341-ADK
	:	IN PROCEEDINGS
	:	UNDER THE
Debtor.	:	BANKRUPTCY CODE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The matters under consideration in this case are (a) Amended Restated Petition by German Bankruptcy Trustee for Ancillary Administration Pursuant to 11 U.S.C. § 304 filed by Dr. Klaus Hubert Goerg ("Dr. Goerg"); (b) Motion for Interim Stay filed by Dr. Klaus Hubert Goerg; (c) Motion for Summary Judgment filed by John F. Sampson; (d) Motion for Dismissal or Abstention filed by Bayerische Hypotheken-und Wechsel-Bank AG ("Hypo-Bank"); (e) Motion for Abstention, Dismissal or Denial of Relief filed by Dr. Bruno M. Kubler; and (f) Motion for Abstention, Dismissal or Denial of Relief filed by John F.

Sampson. This court conducted a two-day trial on these matters on June 27 and 28, 1989.

At trial, the court heard expert and factual testimony from Dr. Goerg personally, and from Dr. Bruno M. Kubler ("Dr. Kubler") in his capacity as trustee in bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Co. KG. Dr. Kubler and Hypo-Bank presented expert testimony on German insolvency law from Professor Hans Hanisch, Professor of Law at the University of Geneva, Switzerland, and from Professor Stefan A. Riesenfeld, Professor of Law at the University of California at Berkeley and at the University of California-Hastings College of Law. In his rebuttal case, Dr. Goerg presented Dr. Hans-Jochem Lueer, Dr. Goerg's law partner who Dr. Goerg retained as counsel in this matter, as his expert witness on these matters.

FINDINGS OF FACT

Based on this court's review of the record in this case, the stipulations of the parties contained in the Consolidated Pretrial Order dated June 22, 1989, and the testimony and evidence presented at trial, the court finds as follows:

1. Heinz Guenter Kaussen ("Kaussen") died on or about April 13, 1985 in Cologne, West Germany. The sole heir to his will under German law was Mrs. Ingeborg Skowronek, his "life companion." He also left four children, all of whom were minors at his death, but only one of whom is now a minor.

2. At the time of his death, Kaussen was a citizen and resident of the Federal Republic of Germany ("West Germany"), and his estate consisted primarily of assets located in West Germany. His estate also included assets located in Ireland, Canada, Georgia, and California. The majority of his creditors, both in number and monetary

amount, were located in West Germany. At present, the majority of Kaussen's assets are in North America.

I. BACKGROUND OF THE WEST GERMAN PROCEEDINGS

3. On May 28, 1985, the Cologne Local Court issued a Probate Certificate recognizing Mrs. Skowronek as the sole heir. On July 17, 1985, upon the application of Mrs. Skowronek, the Cologne Local Court ordered the administration of the Kaussen estate and appointed Hermann Haeck administrator. The court also appointed Karl-Heinz Maus as joint administrator.

4. On November 13, 1985, the two administrators petitioned the Cologne Local Court for the opening of bankruptcy proceedings on the basis that the estate was insolvent.[1] On November 15, 1985, the court ordered the estate sequestered and appointed Dr. Goerg as sequestor. On December 13, 1985, Dr. Goerg reported to the court that the estate was insolvent and that there were grounds for bankruptcy. The representative of Mrs. Skowronek and the children objected to Dr. Goerg's report, and the Bankruptcy Division of the Cologne Local Court appointed an independent expert to review the appraisal. After the independent expert submitted his report, the Bankruptcy Division of the Cologne Local Court rendered an Order on January 24, 1986 adjudicating the Kaussen estate insolvent

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[1] In West Germany, a decedent's estate can be administered under the bankruptcy laws. This is not so in the United States, where a decedent's estate cannot be a debtor under the Bankruptcy Code, except through Section 304. *See In re Goerg*, 64 Bankr. 321 (Bankr. N.D.Ga. 1986), *rev'd*, 844 F.2d 1562 (11th Cir. 1988).

and appointing Dr. Goerg as the bankruptcy trustee of the Kaussen estate. The Cologne Local Court's order was affirmed on appeal by the Cologne Regional Court on February 17, 1986, and by the Cologne Higher Regional Court of Appeals on March 3, 1986, and on April 28, 1986. The German Federal Constitutional Court, on June 6, 1986, refused to review the appeal.

II. BACKGROUND OF THE CALIFORNIA PROCEEDINGS

5. On April 26, 1985, Mrs. Skowronek nominated Peter Michael to serve as Administrator (and if necessary, Special Administrator) of the California estate. The same day, the Probate Department of the California Supreme Court, in and for the City and County of San Francisco ("California Superior Court"), appointed Peter Michael to serve as Special Administrator. On June 10, 1985, the California Superior Court appointed James R. Scannell, the Public Administrator for the City and County of San Francisco, as the Administrator with will annexed of the California estate and denied the heirs' petition asking that Peter Michael be named as Administrator with will annexed. On March 24, 1987, the California Court of Appeal, First Appellate District, Division 5, reversed the Order. Thereafter, the California Supreme Court denied a petition to hear the Public Administrator's appeal. On July 15, 1987, the California Superior Court granted the heirs' petition appointing John F. Sampson as Administrator of the California estate.

6. All of Kaussen's assets in California have been liquidated. As of March 27, 1989, the California Administrator had $7,722,650 on hand. After subtracting tax refunds due the Georgia estate in the amount of $1,595,729 pursuant to the Foreign Investors in Real Property Tax Act ("FIRPTA"), 26 U.S.C. § 897, there is $6,126,921 in the California estate. Administrative expenses asserted to date and

expected to be asserted in the future total approximately $1,275,000.

7. If all anticipated administrative expenses are paid in full, the California Administrator will have approximately $4,850,000 available for distribution to creditors.

8. Sixty-six creditors' claims were filed against the Kaussen California probate estate. Of these, ten were rejected and no lawsuits were filed contesting the rejection. Another ten claims were withdrawn by the creditors. Twenty-five were recognized and paid with no dispute. Eleven claims were settled and paid after lawsuits were filed. Four claims are by German creditors, Deutsche Kreditbank, Deutsche Hypothekenbank Frankfurt-Bremen, Hypo-Bank, and Dr. Kubler. Another three claims belong to tenants, but these claims are currently dormant. Cornish & Carey Commercial filed a claim that has been settled for approximately $100,000. This sum has yet to be paid out of the estate. The remaining claim belongs to a decedent's estate in California which has not yet decided whether to continue pursuing the claim.

III. BACKGROUND OF THE GEORGIA PROCEEDINGS

9. In May 1985, a Probate Administration of Kaussen's Georgia assets was begun in Georgia. Eric Ranney was originally appointed temporary administrator of the Georgia Probate estate on May 31, 1985. On July 17, 1985, Edgardo L. Parungao ("Parungao") succeeded Ranney as Probate Administrator.

10. At the time the Georgia probate proceeding was initiated, the assets located in Georgia consisted primarily of 21 parcels of real estate. To date, all of the Georgia real estate has been sold except one parcel.

11. All U.S. Federal tax claims in any way involving the Kaussen estate have been resolved and paid.

12. The total dollar amount claimed by unpaid U.S. creditors who filed claims in Georgia is $1,089,045.29. In addition, German creditors are asserting claims in the Georgia Probate Court of DM 185,832,260.85 [Deutsche Marks].[2]

13. At present, the Georgia Probate Administrator has $7,014,729. This figure included the FIRPTA funds yet to be received from the California Administrator, but does not include the equity in the remaining parcel of real estate.

IV. THE GERMAN CREDITORS

14. Four German creditors have filed claims in the German Bankruptcy Proceedings, the California Probate Proceeding, and the Georgia Probate Proceeding. Three of these creditors are banks organized under the laws of the Federal Republic of Germany: Deutsche Hypothekenbank Frankfurt-Bremen, Deutsche Kreditbank, and Hypo-Bank. The fourth creditor is Dr. Kubler, in his capacity as trustee in bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Co. KG. The status of the claims of these creditors in each of these proceedings is as follows:

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[2] For comparison purposes, on June 28, 1989, the West German Deutsche Mark closed the business day trading at .5102 U.S. Dollars per Mark. *See The Wall Street Journal*, Friday, June 30, 1989, page C13.

Deutsche Hypothekenbank Frankfurt-Bremen and Deutsche Kreditbank: Dr. Goerg, as the German bankruptcy trustee, has recognized the claims of these two banks as practically uncontested. Parungao, the Georgia Probate Administrator, has indicated to the Probate Court of Fulton County that he has obtained the opinion of German counsel that the claims are valid under German law and not subject to any significant defenses. John F. Sampson, as the California Probate Administrator, has contested these claims. As a consequence, both banks have filed suits in California that Sampson is defending.

Hypo-Bank: Dr. Goerg has yet to make a final accounting of this bank's claim in West Germany. In Georgia, Parungao has indicated to the Probate Court of Fulton Court that he has obtained the opinion of German counsel that the claim is valid and not subject to any significant defenses. In California, Sampson has contested the claim. As a consequence, the bank has filed two suits in California that Sampson is defending.

Dr. Bruno M. Kubler: Two of Dr. Kubler's three claims are presently being litigated in Germany. There the Cologne Regional Court reached a decision regarding two of the claims on May 5, 1989, and an appeal was taken therefrom on June 13, 1989. Dr. Goerg has acknowledged a third claim for DM 10,000,000.00. Dr. Kubler is asserting these same three claims in the California Superior Court. In the Georgia Probate Proceeding, Dr. Kubler filed a claim in the amount of DM 71,818,974.

15. Several German tax authorities have filed claims against the Kaussen estate in Germany in the approximate amount of DM 54,000,000. These German tax authorities have not filed any claims against the Kaussen estates in Georgia or California. The West German tax authorities have asserted that virtually all of their claims are entitled to priority over other creditors' claims pursuant to Section

61(2) of the West German Bankruptcy Act ("Konkursordung", or "KO"). Negotiations regarding tax priorities appear to be ongoing but yet unresolved and contingent. See Goerg Exhibit 46.

V. BACKGROUND ON ANCILLARY PROCEEDINGS IN THE UNITED STATES

16. On June 13, 1986, Dr. Goerg filed a petition for ancillary administration in this court pursuant to Section 304 of the Bankruptcy Code. That petition sought turnover of the Georgia estate and an injunction enjoining the Georgia administrator from continuing to administer Kaussen's Georgia estate. On August 26, 1986, this court dismissed the petition for lack of jurisdiction, finding that Dr. Goerg, as a representative of an insolvent decedent's estate, was not a "foreign representative" of a "foreign proceeding" as required by Section 304(a). *In re Goerg*, 64 Bankr. 321 (Bankr. N.D.Ga. 1986). On May 18, 1988, the Eleventh Circuit held that Dr. Goerg's status as a representative of an insolvent decedent's estate does not bar him from seeking relief under Section 304. *See In re Goerg*, 844 F.2d 1562 (11th Cir. 1988).

17. On or about July 2, 1986, Goerg filed a Petition by a Foreign Representative in a Case Ancillary to a Foreign Proceeding pursuant to Section 304 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California. That petition sought turnover of the California estate to Dr. Goerg and an injunction enjoining the California administrator from continuing to administer the California estate of Kaussen. Dr. Goerg filed a declaration in support of a petition, to which he attached many of the West German court orders that were introduced as exhibits in this trial.

18. On or about October 6, 1986, and after a hearing, the United States Bankruptcy Court for the Northern District of California entered an order, supported by findings of fact and conclusions of law, abstaining pursuant to 11 U.S.C. § 305 and dismissing Dr. Goerg's petition under 11 U.S.C. § 304. Dr. Goerg took no appeal from this order, although there is a question of law as to whether such an order is appealable.

19. Based on the Eleventh Circuit's decision, Dr. Goerg filed an Amended and Restated Petition for ancillary administration with this court on October 24, 1988. In that Amended Petition, Dr. Goerg sought turnover of the assets in both Georgia and California and an injunction against both the Georgia and California administrators from continuing to administer Kaussen's assets. Dr. Goerg now seeks a turnover of assets from both California and Georgia after the respective probate administrators have paid all United States creditors and administrative expenses in full.

VI. GERMAN LAW

20. Dr. Goerg contends that the January 24, 1986 Order of Cologne Local Court authorized him to collect Kaussen's California and Georgia assets under the principle of "universality." That principle in West German bankruptcy law is that the West German estate includes all assets of the debtor, foreign or domestic, at least to the extent that foreign legal systems permit the West German bankruptcy trustee to assert a claim to the foreign assets of the debtor. That principle, however, is subject to certain qualifications and limitations. One such limitation is that West German law recognizes the superior claim of foreign (*i.e.*, non-German) parallel collective proceedings to liquidate assets in that foreign jurisdiction and distribute them to creditors under the laws of that jurisdiction.

21. West German law distinguishes parallel collective proceedings, which distribute a debtor's assets in accordance with the principle of equality (pro rata distributions to creditors with claims of equal priority), from individual enforcement of creditors' claims (such as attachments and garnishments) which distribute a debtor's assets in accordance with the principle of priority (first come, first served). West German law defers to foreign collective proceedings but not to individual efforts.

22. The Georgia and California probate proceedings qualify as parallel collective proceedings under West German law.

23. As noted in Paragraph 15 above, the West German taxing authorities, which have filed tax claims against the Kaussen estate in Germany in the approximate amount of DM 54 million, have asserted that their claims are entitled to a privilege or priority under KO § 61(2). This privilege or priority, if established, would mean that, with only very minor exceptions, such tax claims must be paid in full before any other creditors of the estate would receive anything. As a consequence, if this court were to order the turnover of the Georgia and California probate estates to Dr. Goerg, most and perhaps all of these American assets would be paid to the West German taxing authorities to satisfy West German tax claims, to the exclusion of other creditors unless said priorities were compromised. *See supra* Paragraph 15.

24. West German bankruptcy law, as set forth in KO section 5, requires the equal treatment of all creditors, regardless of citizenship and does not permit any discrimination between German and non-German creditors. Therefore, Dr. Goerg's request that this court order full payment to creditors who are citizens of the United States, no payment to creditors who are citizens of West Germany, and a turnover of the

net Georgia and California estates to the West German bankruptcy trustee, would violate in principle KO section 5.

25. Denial of relief to Dr. Goerg under section 304 will not leave him without remedies under West German law. Dr. Goerg may sue in West German Courts to recover any foreign assets obtained by a West German creditor which he alleges were obtained in violation of West German law. The West German Bankruptcy Court may also credit any foreign assets obtained by a West German creditor against the creditor's claim against the West German estate. These are matters to be determined by the West German Courts. Dr. Goerg may also attempt to obtain authority from West German creditors to file claims on their behalf in the Georgia probate proceedings and perhaps in the California probate proceedings. These are matters to be determined by the Georgia and California courts.

VII. THE GEORGIA AND CALIFORNIA PROBATE PROCEEDINGS

26. The Georgia and California probate proceedings fairly and adequately assure equitable distribution of the Kaussen estates in those jurisdictions.

27. The probate codes of Georgia and California provide for the distribution of proceeds of the Kaussen estates substantially in accordance with the order prescribed by Title 11 of the United States Code.

28. The Georgia and California probate proceedings have resulted in the liquidation of substantially all of Kaussen's assets in Georgia and California as well as the payment or settlement of most of the creditors' claims against the California estate.

29. While continuation of the Georgia and California probate proceedings will require continued employment of United States attorneys by the West German creditors and will consume judicial resources in the States of Georgia and California, the alternative of granting Dr. Goerg's section 304 petition would be even less economical and expeditious in that it would generate complicated and lengthy appeals, consuming the assets of the various estates, while prolonging the Georgia and California probate proceedings, which have moved far along towards conclusion.

30. As noted in paragraphs 17 and 18 above, Dr. Goerg also filed a section 304 petition in the United States Bankruptcy Court for the Northern District of California but that court abstained and Dr. Goerg took no appeal.

31. Were this court to grant Dr. Goerg's section 304 petition, it ought to exercise jurisdiction over both the Georgia and the California probate estates. That, however, may be precluded by the previous unappealed decision of the United States Bankruptcy Court for the Northern District of California.[3]

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[3] Sampson raised the issues of collateral estoppel, res judicata and jurisdiction with respect to the California Bankruptcy Court orderand the California assets in his motion for summary judgment. Sampson also raised the issue whether venue over the California assets and proceedings would be proper in this Court. *See* 11 U.S.C. § 1410. Because this court elects to abstain in this proceeding, the court need not decide these issues.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the court has reached the following conclusions of law.

1. Granting Dr. Goerg's Section 304 petition will not best assure an economical and expeditious administration of the Kaussen estate. 11 U.S.C. § 304(c). To the contrary, denial of Dr. Goerg's Section 304 petition will best assure an economical and expeditious administration of the Kaussen estate. *Id.*

2. Denial of Dr. Goerg's Section 304 petition is consistent with the just treatment of all holders of claims against or interests in the Kaussen estate. 11 U.S.C. § 304(c)(1).

3. Denial of Dr. Goerg's Section 304 petition will not expose claim holders in the United States to prejudice and inconvenience in the processing of their claims. 11 U.S.C. § 304(c)(2).

4. Granting Dr. Goerg's Section 304 petition is not necessary to prevent preferential or fraudulent dispositions of property of the Kaussen estate. 11 U.S.C. § 304(c)(3).

5. Granting Dr. Goerg's Section 304 petition is not necessary to assure distribution of proceeds of the Kaussen estate substantially in accordance with the order prescribed by Title 11. 11 U.S.C. § 304(c)(4).

6. Denial of Dr. Goerg's Section 304 petition is consistent with the doctrine of comity, which includes the concept of reciprocity. 11 U.S.C. § 304(c)(5).

7. The concept of a "fresh start" is irrelevant to this matter involving a decedent's estate. 11 U.S.C. § 304(c)(6).

8. In view of the foregoing, the court exercises its discretion pursuant to 11 U.S.C. § 305 to abstain from taking jurisdiction of Dr. Goerg's Section 304 petition.

9. In the alternative, the court exercises its discretion to dismiss Dr. Goerg's Section 304 petition.

IT IS SO ORDERED.

At Atlanta, Georgia, this 31st day of July, 1989.

/s/ A. D. Kahn
A. D. KAHN
UNITED STATES BANKRUPTCY JUDGE

Appendix B

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER
	:	
KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the ESTATE OF HEINZ GUENTER KAUSSEN, pursuant to the law of the Federal Republic of Germany,	:	A86-04341-ADK
	:	IN PROCEEDINGS
	:	UNDER THE
Debtor.	:	BANKRUPTCY CODE

JUDGMENT

This Court having entered Findings of Fact and Conclusions of Law in this matter with respect to the trial conducted June 27-28, 1989, on the following matters: the Amended and Restated Petition by German Bankruptcy Trustee for Ancillary Administration Pursuant to 11 U.S.C. § 304 filed by Dr. Klaus Hubert Goerg ("Dr. Goerg"); the Motion for Interim Stay filed by Dr. Klaus Hubert Goerg; the Motion for Summary Judgment filed by John F. Sampson; the Motion for Dismissal or Abstention filed by Bayerische Hypotheken-und Wechsel-Bank AG ("Hypo-Bank"); the Motion for Abstention, Dismissal or Denial of Relief filed by Dr. Bruno M. Kubler; and the Motion for Abstention, Dismissal or Denial of Relief filed by John F. Sampson;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that this Court **ABSTAINS** from exercising its jurisdiction over Dr. Goerg's Amended Petition pursuant to Section 305 of the Bankruptcy Code, and in the alternative this Court dismisses the Amended Petition;

FURTHER ORDERED AND ADJUDGED that the Motion for Abstention or Dismissal filed by Hypo-Bank, and the Motions for Abstention, Dismissal or Denial of Relief filed by Dr. Kubler and Mr. Sampson are **GRANTED** as provided in the Findings of Fact and Conclusion of Law;

FURTHER ORDERED AND ADJUDGED that Dr. Goerg's Motion for Interim Stay is **DENIED**; and

FURTHER ORDERED AND ADJUDGED that the Motion for Summary Judgment filed by Mr. Sampson, the California Administrator, is hereby rendered **MOOT**.

IT IS SO ORDERED.

At Atlanta, Georgia this 31st day of July, 1989.

/s/ A. D. Kahn
A. D. KAHN
UNITED STATES BANKRUPTCY JUDGE

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE:	:
ESTATE OF GUENTER	:
KAUSSEN,	: CIVIL ACTION
	: NO. D-22830
Deceased,	:

ORDER

This matter is presently before the Court on Motions for Summary Judgment filed on behalf of Edgardo Parungao, Administrator CTA of the Estate of Guenter Kaussen (the "Administrator"), and Dr. Klaus Hubert Goerg, the German bankruptcy trustee of the Estate of Guenter Kaussen. Attorneys for the Administrator also seek an award of additional attorneys' fees.

Both Motions for Summary Judgment seek the same relief, to wit: Direction to the Administrator to pay all valid claims filed in Georgia, except claims of German nationals, and to deliver the remaining proceeds of the estate to Dr. Goerg for return to Germany and the determination of the claims of German nationals.

The only objection to the Motions for Summary Judgment have been filed by two German creditors: Dr. Bruno M. Kubler, a German trustee in bankruptcy of two German entities of which Kaussen was a principal, and Bayerische Hypotheken-Wechsel Bank A.G. ("Hypo-Bank"), a German bank with claims against the Kaussen estate arising out of numerous transactions in Germany between Kaussen and the bank. The only objection to the request for additional attorneys' fees was filed by Hypo-Bank. After consideration,

the Court believes the Motions for Summary Judgment should be granted. Accordingly,

The Administrator is directed to pay in full all valid claims filed with the Administrator in the estate in the amounts allowed by the Administrator for such claims in accordance with the provisions of O.C.G.A. §53-7-91, except that the Administrator shall not pay any amounts on the following claims:

1. Dr. Bruno M. Kubler;

2. Deutsche Hypothekenbank Frankfurt;

3. Deutsche Kreditbank; and

4. Bayerische Hypotheken-Wechsel Bank A.G.

The Administrator's request for legal fees equal to the statutory fee for administration of the estate is denied. Counsel may petition this Court for reasonable fees to defend any appeal taken from this order through the appellate courts of Georgia and for services required in completing the administration of the estate.

The Administrator shall, after payment of all claims and expenses as above provided, deliver the remaining property in the hands of the Administrator to Dr. Goerg for determination under German law of the claims of all German creditors, including the claims of the German creditors who have filed claims in Georgia.

SO ORDERED, this 4th day of April, 1990.

/s/ Joel J. Fryer
HONORABLE JOEL J. FRYER
Judge, Fulton Superior Court

Appendix D

In the Supreme Court of Georgia

Decided: January 10, 1991

S90A1633. HYPOBANK ET AL. v. PARANGAO ET AL.

S90A1634. KUBLER ET AL. v. PARANGAO ET AL.

PER CURIAM.

Judgment affirmed without opinion pursuant to Rule 59. All the Justices concur.

Appendix E

SUPREME COURT OF GEORGIA

ATLANTA JANUARY 30, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A1634

BRUNO M. KUBLER ET AL. V. EDGARDO PARUNGAO ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix F

SUPREME COURT OF GEORGIA

ATLANTA JANUARY 31, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

Case No. S90A1633

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK ET AL. V. EDGARDO PARUNGAO ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix G

EXCERPTS FROM THE

TREATY OF

FRIENDSHIP, COMMERCE AND NAVIGATION

BETWEEN

THE UNITED STATES OF AMERICA

AND

THE FEDERAL REPUBLIC OF GERMANY

[DATED OCTOBER 29, 1954]

The United States of America and the Federal Republic of Germany desirous of strengthening the bonds of friendship existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements promoting mutually beneficial investments, and establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of unconditional most-favored-nation treatment reciprocally accorded, and for that purpose have appointed as their Plenipotentiaries:

The President of the United States of America:

Mr. John Foster Dulles, Secretary of State of the United States of America, and

The President of the Federal Republic of Germany:

Dr. Konrad Adenauer, Federal Chancellor and Federal Minister of Foreign Affairs,

who, having communicated to each other their full powers found to be in due form, have agreed as follows:

ARTICLE I

1. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.

2. Between the territories of the two Parties there shall be, in accordance with the provisions of the present Treaty, freedom of commerce and navigation.

ARTICLE II

1. Nationals of either Party shall, subject to the laws relating to the entry and sojourn of aliens, be permitted to enter the territories of the other Party, to travel therein freely, and to reside at places of their choice. Nationals of either Party shall in particular be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.

2. Each Party undertakes to make available the best facilities practicable for travel by tourists and other visitors with respect to their entry, sojourn and departure, and for the distribution of information for tourists.

3. Nationals of either Party, within the territories of the other Party, shall enjoy freedom of conscience; and

****

ARTICLE V

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to molestation or to entry without just cause. Official searches and examinations of such premises and their contents, when necessary, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

3. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights of interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied.

4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party, except for the public benefit and in accordance with due process of law, nor shall it be taken without just compensation. Such compensation shall represent the equivalent of the property taken and shall be made in an effectively realizable form and without unnecessary delay. Adequate provision shall have been made at latest by the time of the taking for the determination and the giving of the compensation.

5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. Moreover, enterprises in which

nationals or companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

ARTICLE VI

1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

****

ARTICLE XXV

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. National treatment is accorded by the Federal Republic of Germany in the provisions of the Present Treaty in consideration of the national treatment accorded by the United States of America to the nationals, companies, products, vessels, or other objects, of the Federal Republic of Germany, with respect to the same subject matter.

3. National treatment accorded under the provisions of the present Treaty to companies of the Federal Republic of Germany shall, in any State, Territory, or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.

4. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

5. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

6. Without prejudice to other methods of establishing nationality, a person in possession of a valid passport issued by the competent authorities of either Party, or a valid identity document named in the Protocol, shall be considered a national of that Party.

FILED
MAY 30 1991
OFFICE OF THE CLERK

No. 90-1741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK AG

and

DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,

Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany,

and

EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

RESPONDENT DR. GÖRG'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have demonstrated the existence of a substantial federal question which was properly raised, presented and pursued in the state court proceedings.

2. Whether the Georgia Supreme Court's affirmance of the state court judgment rests upon adequate and independent state law grounds.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1741

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK AG

and

DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,

Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany,

and

EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

---

RESPONDENT DR. GÖRG'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article III, § 1, Constitution of the United States of America:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such

inferior Courts as the Congress may from time to time ordain and establish. . . .

2. Article III, § 2, Constitution of the United States of America:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

3. 28 U.S.C. § 1257(a) (1988):

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

4. O.C.G.A. § 1-3-9 (1990):

> The laws of other states and foreign nations shall have no force and effect of themselves within this state further than is provided by the Constitution of the United States and is recognized by the comity of states. The courts shall enforce this comity, unless restrained by the General Assembly, so long as its enforcement is not contrary to the policy or prejudicial to the interest of this state.

5. O.C.G.A. § 9-11-56(c) (1982):

> (c) *Motion and proceedings thereon.* The motion [requesting summary judgment] shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall

be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

6. O.C.G.A. § 9-11-56(e) (1982):

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in the evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT OF THE CASE

A. Factual Background.

This case involves the attempts of two German creditors to circumvent certain orders entered by the courts of the Federal Republic of Germany ("Germany") that prescribe the method and manner of handling their claims, which arise under and are governed by the provisions of German law. At issue is the bankruptcy estate of the late Heinz Günter Kaussen ("Kaussen"), a citizen and resident of Germany until his death in April 1985. The German bankruptcy estate includes assets and the proceeds of assets located in Germany, Ireland, Canada, California, and Georgia.

At the time of his death, Kaussen's liabilities exceeded his assets by more than 55 million U.S. dollars. On Jan-

uary 24, 1986, the Cologne Local Court determined that the Kaussen estate was insolvent and appointed Dr. Klaus Hubert Görg, one of the Respondents herein, as the bankruptcy trustee charged with liquidating the estate for the benefit of Kaussen's creditors.[1]

The sole beneficiary of Kaussen's will, Ms. Ingeborg Skowronek, Kaussen's life-long companion and the mother of his four daughters, vigorously contested the bankruptcy petition in the Cologne Local Court and on several appeals, but lost. The Order of Adjudication was affirmed on appeal by the Cologne Regional Court on February 17, 1986, and by the court of last resort in such cases, the Cologne Higher Regional Court of Appeals, on March 3, 1986, and April 28, 1986. (The Order of Adjudication and these affirming opinions are hereinafter collectively referred to as the "German Court Orders.")[2] The Federal German Constitutional Court, on June 6, 1986, refused to review this matter for the reasons set forth in its opinion included at page 32a of Respondent Görg's Appendix. Kaussen's estate is now being liquidated under the supervision of the Bankruptcy Division of the Cologne Local Court, pursuant to Section 215 of the Konkursordnung (§ 215 of the German Bankruptcy Act).

The order of the Cologne Local Court, entered on January 24, 1986, and upheld on appeal, determined that the German bankruptcy proceedings extended to all assets of the Kaussen estate, including those located abroad.

> Subject to the recognition by the respective foreign legal system, the bankruptcy sequestration shall also include the proceeds of property of the deceased

---

[1] A copy of the certified German-English translation of the Cologne Local Court's order of adjudication, entered January 24, 1986 (the "Order of Adjudication") is included in Respondent Görg's Appendix at page 1a.

[2] Copies of the certified German-English translations of these affirming opinions are included in Respondent Görg's Appendix at pages 6a, 15a, and 26a, respectively.

> located abroad which is part of the decedent's bankrupt estate, irrespective of whether any special administration with respect to the decedent's property located abroad has already been ordered in the foreign country under the laws of the respective country.

See Respondent Görg's Appendix at page 3a. The Cologne Local Court further decreed that any persons in possession of any property of the Kaussen bankruptcy estate or owing monies to the estate must report such items or debts to Dr. Görg. *See* Respondent Görg's Appendix at page 2a.

In the Spring and Summer of 1985, prior to the commencement of the bankruptcy proceedings in Germany, Ms. Skowronek acting for herself and on behalf of her four daughters (the "Kaussen Heirs") initiated probate proceedings in Georgia, California and the Province of Quebec. Edgardo L. Parungao (the "Georgia Administrator"), the other Respondent herein, ultimately was appointed administrator in Georgia and has proceeded to collect and liquidate Kaussen's Georgia assets.

Unlike Petitioners, hundreds of creditors whose claims arose under and are governed by German law (the "German Law Claims") chose to obey the orders of the German bankruptcy court and the applicable provisions of German bankruptcy law [3] and filed their claims only in the German bankruptcy proceeding. Petitioners, however, chose to ignore the prohibition of German bankruptcy law and initiated actions in Georgia, California and Quebec to take unfair advantage of creditors in those jurisdictions and creditors in Germany who were unwill-

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[3] Similar to the stay imposed by Section 362 of the United States Bankruptcy Code, Sections 12 and 14 of the German Bankruptcy Act have been interpreted to prohibit action by individual creditors outside the context of the German bankruptcy proceeding. *See* G. Kuhn & W. Uhlenbruck, *Konkursordnung Kommentar* §§ 237, 238 (10th ed. 1986).

ing or unable to afford to pursue recovery in all four jurisdictions where Kaussen's assets are being administered.

In carrying out his duties under the German Court Orders, and to stem the proliferation of duplicative actions involving the Kaussen estate in multiple jurisdictions, Dr. Görg sought assistance from the United States Bankruptcy Court for the Northern District of Georgia (the "Georgia Bankruptcy Court"). Pursuant to Section 304 of Title 11 of the United States Code, Dr. Görg filed a petition for ancillary administration of the Kaussen bankruptcy estate. The Georgia Bankruptcy Court dismissed the Section 304 petition, but the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") reversed that decision and this Court denied certiorari.[4]

Upon remand, the Georgia Bankruptcy Court abstained from taking jurisdiction of Dr. Görg's Section 304 petition, or in the alternative, dismissed the petition.[5] Dr. Görg appealed this order to the United States District Court for the Northern District of Georgia ("Georgia District Court"), which dismissed the appeal as nonreviewable under 11 U.S.C. § 305(c) before its amendment by Section 309 of the Federal Courts Study Committee Implementation Act 1990, Pub. L. 101-650, 104-Stat. 5089, 5113 (1990).[6] Dr. Görg appealed the dismissal to the Eleventh Circuit which, on May 13, 1991, reversed the Georgia District Court's dismissal of Dr. Görg's appeal and remanded the case for additional review.[7]

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[4] *In re Goerg*, 64 Bankr. 321 (Bankr. N.D. Ga. 1986), *rev'd*, 844 F.2d 1562 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989).

[5] *In re Goerg*, No. A86-04341-ADK (Bankr. N.D. Ga. July 31, 1989).

[6] *Goerg v. Parungao (In re Goerg)*, No. 1:89-CV-2209-WCO (N.D. Ga. June 22, 1990).

[7] *Goerg v. Parungao (In re Goerg)*, No. 90-8680 (11th Cir. May 13, 1991) (WESTLAW, 1991 WL 63750). The Eleventh Circuit held that permitting a bankruptcy court to issue a nonreviewable Section

B. Decisions Below.

Dr. Görg also sought the assistance of the Superior Court of Fulton County, Georgia (the "State Trial Court") in implementing his instructions to collect and liquidate all assets for the Kaussen creditors. The Georgia Administrator, Respondent Parungao, earlier had filed an action in the State Trial Court, seeking a determination of his authority and obligations with respect to Kaussen's Georgia assets and the rights of creditors with state law claims, as well as those with claims arising from transactions in Germany governed by German law. Dr. Görg filed a counterclaim in this action requesting recognition and enforcement of the German Court Orders.

Thereafter, Dr. Görg filed a motion for summary judgment on his counterclaim, seeking turnover of the assets remaining in the Georgia estate after payment of the claims arising under and governed by local laws (the "Local Law Claims"). The Georgia Administrator, agreeing with Dr. Görg, sought identical relief in another motion for summary judgment based on his amended complaint in the same proceeding. Upon consideration of the record and the evidence properly before it, the State Trial Court, in its judgment entered April 10, 1990 (the "Judgment"),[8] granted the two motions for summary judgment, thereby recognizing and enforcing the German Court Orders. *See* Respondent Görg's Appendix at page 37a.

The Judgment requires that, after all Local Law Claims and expenses are paid, the Georgia Administrator is to "deliver the remaining property in [his hands to

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305 order affecting a district court's jurisdiction over a bankruptcy case violated Article III of the United States Constitution. *See* Respondent Görg's Appendix at page 57a.

[8] This is the same judgment as that referred to by Petitioners as being dated April 4, 1990. The reference to April 10, 1990 used herein reflects the date on which the judgment was entered on the docket.

Dr. Görg] for determination under German law of the [German Law Claims], including the claims of the German creditors who have filed claims in Georgia." *See* Respondent Görg's Appendix at page 38a. Petitioners appealed the Judgment to the Supreme Court of the State of Georgia (the "Georgia Supreme Court"). After briefs were filed and oral argument heard, the Georgia Supreme Court, on January 10, 1991, affirmed the Judgment, without opinion, pursuant to Georgia Supreme Court Rule 59 (the "Affirming Order").[9] *See* Respondent Görg's Appendix at page 50a. All Justices concurred in the decision. *Id.* By separate orders dated January 30 and 31, 1991, the Georgia Supreme Court denied Petitioners' separate requests for reconsideration.[10] *See* Respondent Görg's Appendix at pages 55a and 56a.

C. Jurisdiction.

Petitioners have requested review of the Georgia Supreme Court's affirmance of the Judgment alleging incorrectly that the jurisdiction of this Court under 28 U.S.C. § 1257(a) has been properly invoked. Petitioners, however, have failed to properly raise, present and pursue in the state courts of Georgia the federal challenges they seek to have determined by this Court. Accordingly, this Court does not have jurisdiction to grant the relief requested in the petition for writ of certiorari.

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[9] Rule 59 provides that a judgment may be affirmed without entry of a written opinion "when the court determines one or more of the following circumstances exists and is dispositive of the appeal: (1) The evidence supports the judgment; (2) No harmful error of law, properly raised and requiring reversal, appears; [or] (3) The judgment of the court below adequately explains the decision and an opinion would have no precedential value." Ga. Sup. Ct. R. 59.

[10] Apparently concerned that the record failed to show that a substantial federal question was considered and decided by the state courts, Petitioners thereafter filed a Joint Request of Appellants for Federal Question Certification in the Georgia Supreme Court. When Dr. Görg opposed the request, it was withdrawn before any action was taken by the Georgia Supreme Court.

REASONS FOR DENYING THE WRIT

Petitioners have failed to demonstrate the existence of a substantial federal question that was properly raised, presented and pursued in the state courts. Before the State Trial Court, Petitioners failed to offer any admissible or competent evidence in support of the factual assertions essential to their federal claims. Petitioners, therefore, have not properly preserved such challenges for review by this Court. Moreover, the violations of federal constitutional law and treaty rights alleged by Petitioners are wholly illusory and do not merit the attention of this Court.

Because the Judgment in question rests upon adequate and independent state law grounds, review by this Court is both inappropriate and unnecessary. The petition for writ of certiorari, therefore, should be denied.

I. PETITIONERS HAVE FAILED TO DEMONSTRATE THE EXISTENCE OF A SUBSTANTIAL FEDERAL QUESTION THAT WAS PROPERLY RAISED, PRESENTED AND PURSUED IN THE STATE COURTS BELOW.

Petitioners bear the burden of establishing this Court's jurisdiction to review the Affirming Order, *Durley v. Mayo*, 351 U.S. 277, 231 (1956), but they cannot meet that requirement. Notably, Petitioners fail to recite in their statement of the case the method by which they purportedly raised the federal questions sought to be reviewed, or the manner in which these questions were allegedly passed on by the State Trial Court and the Georgia Supreme Court, as required by United States Supreme Court Rule 14.1(h).

This Court's jurisdiction to entertain Petitioners' request for a writ of certiorari is limited by Section 1257 of Title 28 of the United States Code:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had

> may be reviewed by the Supreme Court where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (1988). This Court has long interpreted Section 1257 to limit its jurisdiction over state court decisions to consideration of substantial federal questions that have been properly raised, presented and decided by the state courts below. *See, e.g., Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). The reason for this carefully crafted balance is "found in the partitioning of power between the state and federal judicial systems [established in Article III of the United States Constitution]." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

"In addition to the question of jurisdiction arising under the statute controlling [the Court's] power to review final judgments of state courts, there are [several] sound [policy] reasons for this [rule]." *Cardinale*, 394 U.S. at 439 (citation omitted). In *Cardinale*, this Court cited the following considerations to support the limitations on the Court's jurisdiction: (1) state courts should be given the first opportunity to consider the state law in light of the constitutional or federal challenge; (2) the record on a federal challenge will not be sufficiently developed if not properly raised below; and (3) if raised below, the federal question might be "blocked" by an adequate and independent state law ground. *Id.* Each of these considerations is, of course, present in this case.

A. Petitioners Did Not Properly Raise, Present or Pursue Their Federal Challenges Below.

In presenting their federal challenges to the two motions for summary judgment, Petitioners failed to observe state procedural requirements. This omission precluded full review of the alleged federal issues by the state courts below and is fatal to Petitioners' request for consideration by this Court. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 301 (1903).

The Judgment under review was entered on the summary judgment motions, which had sought recognition and enforcement of the German Court Orders and directions from the State Trial Court to the effect that all of the Local Law Claims and costs of administration would be paid and the net assets of the estate remitted to Dr. Görg to permit distribution to claimants in the German bankruptcy proceeding in accordance with German law. Two central concerns were raised by the summary judgment motions: (i) whether the laws of Georgia or Germany should govern the German Law Claims; and (ii) whether the German Court Orders and German bankruptcy law require adjudication of the German Law Claims in Germany.

In the State Trial Court, Respondents presented and made a part of the record admissible and competent evidence to support their statements of undisputed material facts. *See* Respondent Görg's Appendix at page 39a. In particular, Respondents presented proper evidence that: (1) the German bankruptcy estate consists of all Kaussen assets whether in Germany or abroad, regardless of the institution of administrative proceedings by other jurisdictions; (2) Dr. Görg is empowered and authorized, pursuant to the German Court Orders, to collect and liquidate such assets for the benefit of Kaussen creditors; (3) German law provides that individual creditors

subject to the jurisdiction of the German courts and holding claims governed by German law are prohibited from attempting to collect or enforce their claims outside the German bankruptcy proceeding; and (4) the German Court Orders meet all the prerequisites entitling them to be recognized and enforced pursuant to the principles of comity under Georgia law.[11]

In response, Petitioners argued that extending comity to the German Court Orders was inappropriate and violated their equal protection rights under the United States Constitution, as well as the terms of the Treaty of Friendship, Commerce and Navigation between Germany and the United States (the "Treaty").[12] Petitioners' interpretations of German bankruptcy law and the German Court Orders are central to their federal law challenges. However, no admissible and competent evidence in support of Petitioners' positions on these issues was properly presented and made a part of the evidentiary record in the State Trial Court.[13]

Under Georgia law, when a motion for summary judgment is supported by affidavit or other testimony, the opposing party "may not rest upon the mere allegations [in the nonmoving party's pleadings] or denials of [the

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[11] Applicable Georgia law provides that the courts of the State of Georgia shall apply the doctrine of comity "so long as its enforcement is not contrary to the policy or prejudicial to the interests of this state." O.C.G.A. § 1-3-9 (1990). *See* discussion, *infra*, at pages 20-24.

[12] Treaty of Friendship, Commerce and Navigation, July 14, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1865, T.I.A.S. No. 2863.

[13] Petitioners suggest the State Trial Court acted improperly by entering its judgment without hearing any evidence on the validity of the various claims involved. However, motions for summary judgment are usually decided without hearings and factual support for the parties' respective positions is properly submitted in either affidavit form or by reference to depositions, interrogatory answers, and properly identified documents entered of record. *See* O.C.G.A. § 9-11-56(e) (1982).

moving party's] pleading, but [rather must support] by affidavits or [other evidence and], must set forth specific facts showing that there is a genuine issue for trial." O.C.G.A. § 9-11-56(e) (1982). The failure to so respond requires that the movant's statement of material facts, if supported by admissible and competent evidence on the record, shall be taken as true; and that the summary judgment motion shall be granted, if "the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c) (1982). Thus, an inadequate or improper response by an opposing party will cause "judgment . . . [to be] entered against him." O.C.G.A. § 9-11-56(e) (1982).

While Petitioners each filed a response to Dr. Görg's statement of undisputed material facts, their assertions in opposition were not based upon admissible and competent evidence and were otherwise unsupported by the record. Both at the State Trial Court and in the Georgia Supreme Court, Petitioners relied upon the transcript of a hearing before the Georgia Bankruptcy Court which, although attached to their briefs in opposition, was not properly identified or otherwise made admissible in accordance with established state court procedures. *See Tony v. Pollard*, 248 Ga. 86, 281 S.E.2d 557 (1981) (transcript certified and transmitted from probate court to trial court was properly before the trial court and could be relied on to support or oppose summary judgment).

Furthermore, Petitioner Hypobank failed to submit any affidavit or point to any other evidence of record to support its position in opposition to the relief requested or in support of its position that entry of the judgment sought would result in impermissible discrimination against the holders of German Law Claims. Petitioner Kübler did submit an affidavit, but the affiant was Kübler's Georgia counsel who lacked personal knoweldge and thus was not competent to testify to many of the ma-

terial facts recited in his affidavit. *See* O.C.G.A. § 9-11-56(e) (1982); *see also Morris-Bancroft Paper Co. v. Coleman*, 188 Ga. App. 809, 811, 374 S.E.2d 544, 545 (1988) (an affiant's statement that facts were "true and correct to the best of his knowledge and belief" does not meet the personal knowledge standard required for evidence offered in opposition to a motion for summary judgment).

Dr. Görg and the Georgia Administrator, on the other hand, fully supported their statements of material facts with appropriate affidavit testimony and other evidence properly identified and filed of record in the State Trial Court. *See* Respondent Görg's Appendix at page 39a. Because the Petitioners failed to do this in accordance with the procedural requirements of Georgia law, the State Trial Court properly ignored Petitioners' unsupported responses and entered the summary judgment sought by Dr. Görg and the Georgia Administrator. Thus, the Georgia Supreme Court's affirmance of the Judgment rests upon adequate procedural grounds.

B. Petitioner's Challenge To The Judgment Does Not Present Any Substantial Federal Question.

Petitioners contend that the Judgment constitutes a discriminatory application of state law based upon alienage and thus violates their rights to equal protection as guaranteed by the fourteenth amendment to the United States Constitution. Petitioners also maintain that the relief granted in the Judgment contravenes rights secured to them by the terms of the Treaty.[14] Such assertions are, however, unsupportable and stem from a lack of understanding of the basis and terms of the Judgment.

As Dr. Görg argued extensively to the Georgia Supreme Court, granting comity to the German Court Orders and

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[14] Although both Petitioners seem to have adopted this position before this Court, only Kübler raised the Treaty violation argument before the State Trial Court and the Georgia Supreme Court.

directing the Georgia Administrator to turn over the net Kaussen assets is not a violation of the equal protection clause or the Treaty. The flaw of Petitioners' argument is that it is not discriminating, nor is it unequal treatment, for a Georgia court to accord comity to a foreign judgment merely because the result might be different for the claimant whose claim is governed under foreign law than it would be if Georgia law applied.

The same reasoning is dispositive of Petitioners' contention that the Georgia statute would require another result. It is indisputable that under conflict of laws principles the Georgia probate statute is not the governing law for the German Law Claims. The recognition of foreign judgments and the application of foreign law to claims arising under that law is nothing more than the neutral application of legal principles.

1. *The Judgment does not discriminate against Petitioners on the basis of alienage.*

Petitioners assert that the Judgment interprets and applies Section 53-7-91 of the Official Code of Georgia to create an impermissible classification of claimants based upon alienage. However, the classification established by the Judgment is not based on alienage.

The Judgment distinguishes between claims that arise under and are governed by local laws and claims arising in Germany that are subject to resolution by German courts applying the laws of Germany. Petitioners' claims have already been filed in Germany where they had been participating in the bankruptcy proceedings pending there.[15]

The fallacy of Petitioners' argument of discriminatory classification is highlighted by a simple example. If two citizens of the United States had entered into contracts

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[15] In fact, prior to their involvement in the proceedings pending outside of Germany, Petitioners were members of the creditors committee in the German bankruptcy proceeding.

with Kaussen in Germany, which were to be performed in Germany, and all relevant events relating to any contractual dispute occurred in Germany, it is indisputable that Georgia conflict of laws principles would require application of German substantive law. *See Fimian v. Guy F. Atkinson Co.*, 209 Ga. 113, 114, 70 S.E.2d 762, 763 (1952) (Georgia applies the rule of *lex loci contractus* to determine which law will govern interpretation of contracts).

Moreover, if the dispute were litigated and decided in Germany, and the German decision sought to be enforced in the courts of Georgia, comity would recognize and enforce that decision against the two American claimants just as it had done against similarly situated German nationals. There simply is no disparate or unequal treatment based on country of origin in this case. Any difference between the treatment accorded the claims of American and German creditors is properly based upon a difference in the facts surrounding such claims and a neutral application of state conflict of laws principles to such facts.

Petitioners' equal protection argument is flawed for at least one other reason. It is a "settled rule that the Fourteenth Amendment guarantees equal laws, not equal results," *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1979), and thus Petitioners must show something more than disparate impact. *Id.; see also Arlington Heights v. Metropolitan Housing Dev. Corp.* 429 U.S. 252, 265 (1977). To succeed, Petitioners must demonstrate that the Judgment was prompted not by the neutral application of legal principles, but by some invidious, discriminatory animus. *Id.; Cook v. Ashmore*, 579 F. Supp. 78, 85 (N.D. Ga. 1984). *Accord, Ballard v. Blount*, 581 F. Supp. 160, 166 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir.), *cert. denied*, 469 U.S. 1086 (1984). No such showing has been made by Petitioners, nor could it be since none exists. Instead, there is ample legal authority and uncontroverted evidence to support the State Trial

Court's entry of the Judgment and the Georgia Supreme Court's affirmance thereof.

2. *Entry of the Judgment does not constitute an impairment of Petitioners' rights granted under the Treaty or interference with foreign relations.*

Petitioners argue that the Judgment violates their rights granted under the Treaty by: (1) failing to grant fair and equitable treatment to the claims of German nationals; and (2) denying German nationals equal access to the courts of the State of Georgia to pursue their claims. Petitioners further contend that the Judgment interferes with foreign relations.

To support their position, Petitioners rely upon *Zschernig v. Miller*, 389 U.S. 429 (1968). However, that case is inapposite here. First, *Zschernig* involves a state probate statute that expressly classified non-resident aliens and afforded them disparate treatment on its face. *See Id.* at 430. No such improper distinction is present in this case. Second, the statute in *Zschernig* required review of the actual administration of foreign law, the credibility of diplomatic statements issued by foreign sovereign nations, and similar inquiries as a prerequisite to exercise of rights granted the aliens under the statute. *Id.* at 435. Petitioners do not and could not suggest that a search for the " 'democracy quotient' of a foreign [government]," *id.*, is at issue in this case.

Contrary to their assertions, Petitioners were accorded the same treatment as similarly situated Americans would have received in respect of any claim arising under and governed by the law of another country where a proceeding with respect to such claims is pending. The Treaty requires no more. *See Pfizer, Inc. v. Lord*, 522 F.2d 612, 619 n.9 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976).[16]

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[16] In *Pfizer*, the United States Court of Appeals for the Eighth Circuit held that the Treaty of Amity & Economic Relations between

Petitioners' allegation that they were denied equal access to the courts is also without merit. "The term 'access' in such [a treaty] is intended to guarantee treaty nationals equal treatment with respect to procedural matters like filing fees, the employment of lawyers, legal aid, security for costs and judgments, and so forth." *Blanco v. United States*, 775 F.2d 53, 62 (2d Cir. 1985) (construing Treaty of Friendship, Commerce and Consular Rights between United States and Honduras, July 23, 1928). Petitioners' assertion is absurd given that they have litigated their positions before numerous state and federal courts, including the State Trial Court, the Georgia Supreme Court, the Georgia Bankruptcy Court, the Georgia District Court, the Eleventh Circuit, and the United States Supreme Court.

II. THE AFFIRMING ORDER AND JUDGMENT ARE BASED UPON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS, MAKING REVIEW BY THIS COURT UNNECESSARY AND INAPPROPRIATE.

It is well established that where a challenged state court decision rests upon adequate and independent state law grounds, this Court will decline to review such judgment. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257 263 (1872). The reason for this

> is so obvious it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of [the Court's] jurisdiction. [The Court's] only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And [the Court's] power is to correct

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the United States and Iran which provided that "[n]ationals and companies of either High Contracting Party shall have freedom of access to the courts of justice . . . of the other [party]," *id.*, merely guaranteed Iranian nationals access on the same terms available to United States citizens and not on more favorable terms. *Id.*

> judgments, not to revise opinions. [The Court] is not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after [the Court] corrected its views of federal laws, [the Court's] review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).

To aid its determination of whether it has jurisdiction to review state court judgments, this Court employs certain presumptions. In a case, such as this, where the affirming state appellate court has not entered a written opinion but an adequate state law ground exists to support the decision below, this Court has often presumed the judgment of the highest state court was based on that state law ground. *See, e.g., Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); *Lynch v. New York*, 293 U.S. 52, 54-55 (1934).[17] To overcome this presumption, the petitioning party has been required to demonstrate that the state law ground cannot explain the decision below. *Durley v. Mayo*, 351 U.S. 277, 281 (1956). Petitioners have not attempted to meet this burden and could not, because the Georgia Supreme Court's affirmance of the Judgment rests on at least two adequate and independent state law grounds either one of which would be sufficient to make review by this Court unnecessary and inappropriate.

A. Petitioners' Failure To Observe Reasonable State Procedural Rules Constitutes Adequate And Independent State Grounds.

Petitioners' failure to comply with Georgia's procedural and evidentiary requirements for opposing summary judgment motions constitutes an adequate and in-

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[17] *But cf. Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983) (when a state court enters a written opinion but the basis of its decision is ambiguous, but "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear," the Court will accept jurisdiction).

dependent state ground barring review by this Court. *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *Michel v Louisiana*, 350 U.S. 91, 93 (1955). So long as the state procedural rule is reasonable, *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977), and "strictly or regularly followed," *Hathorn*, 457 U.S. at 262; *Barr*, 378 U.S. at 149, it will be deemed adequate.[18]

Petitioners' equal protection and Treaty arguments are premised upon a showing, among other things, that: (1) the holders of German Law Claims were entitled to seek enforcement of their claims against assets located in Georgia; (2) such individual collection efforts did not contravene Dr. Görg's authority as bankruptcy trustee; and (3) the Georgia assets do not constitute part of the German bankruptcy estate. Consideration of Petitioners' federal and constitutional challenges was foreclosed by their failure to comply with applicable state procedural rules regarding the submission of admissible and competent evidence. *See* discussion at pages 11-14, *supra*. Furthermore, Petitioners' have not contended and indeed nothing in the record of this case suggests that application of Georgia's summary judgment rules was improper in any way. Accordingly, Petitioners' claims were properly barred and not considered by the state courts below and should not be reviewed by this Court.

B. The Decisions Below Rest Upon Adequate And Independent Substantive State Law Grounds.

The Georgia Supreme Court's affirmance of the Judgment rests upon an additional adequate and independent state ground. The Judgment reflects the State Trial

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[18] State procedural rules are, however, inadequate grounds to limit review by this Court when they are: (1) applied to discriminate against a federal claim, *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); (2) novel, *NAACP v. Alabama*, 357 U.S. 449 (1958); or (3) unimportant or meaningless, *Douglas v. Alabama*, 380 U.S. 415, 421-422 (1965). Clearly, these exceptions are not applicable here.

Court's recognition and enforcement of the German Court Orders under the doctrine of comity. The German Court Orders require sequestration of all assets of the Kaussen estate, wherever located, and resolution by the courts of Germany of all claims arising under and governed by German law. *See* Respondent Görg's Appendix at page 3a. The State Trial Court's decision in this action correctly extended comity to the German Court Orders and is in accord with decisions of the federal courts. *See, e.g., Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987); *Cunard S.S. Co., Ltd. v. Salen Reefer Servs. A.B.*, 773 F.2d 452 (2d Cir. 1985); *Clarkson Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976). Furthermore, the recognition and enforcement of the German Court Orders by the State Trial Court is consistent with this Court's analysis of the doctrine of comity in *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908).[19]

The Georgia Supreme Court long ago held that Georgia courts should extend comity to decisions of courts of foreign countries, so long as: (1) the issues have been adjudicated in a regular manner; (2) the foreign court had jurisdiction; (3) the foreign country is a nation whose laws and judicial system are in harmony with the fundamental concepts of justice recognized by United States law; and (4) recognition and enforcement would not be contrary to the policy or prejudicial to the interests of the State of Georgia. *Coulborn v. Joseph*, 195 Ga. 723, 732-733, 25 S.E.2d 576, 581 (1943).

The principle of comity is also recognized in Georgia by a specific statutory provision. Section 1-3-9 of the

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[19] Petitioners devote a significant portion of their petition to discussion of the *Disconto Gesellschaft* case, which was never cited or relied upon by any of the parties in the proceedings below. Even if the result in *Disconto Gesellschaft* was incorrect as Petitioners argue, the Court's explanation of the principles of international comity remain viable and suggest an adequate and independent state law basis for the Judgment and the Affirming Order of the Georgia courts.

Official Code of Georgia Annotated provides that the courts of the state shall enforce the doctrine of comity "so long as its enforcement is not contrary to the policy or prejudicial to the interests of this state." O.C.G.A. § 1-3-9 (1990). The State Trial Court correctly determined that, under the undisputed and uncontroverted facts of this case, the prerequisites for comity were met.

First, Petitioners have never disputed, neither in this action nor in Germany, that all issues encompassed within the German Court Orders were adjudicated in a regular manner in Germany. The Kaussen Heirs, in fact, were notified of the commencement of the German bankruptcy proceeding in the Cologne Local Court and contested such proceedings through four appeals. Petitioners both filed claims in the German bankruptcy proceeding and initially served on the creditors' committee. Despite their involvement and participation in the bankruptcy, Petitioners did not contest in the German courts the order directing and authorizing Dr. Görg to collect all Kaussen assets, including those located abroad. Rather, they objected to Dr. Görg's actions for the first time in the United States courts, over two years after entry of the first of the German Court Orders. Moreover, Petitioners have never argued in this state court action that the German Court Orders were not litigated in a regular manner.

Second, it is undisputed that the Cologne Local Court had jurisdiction over the bankruptcy of the Kaussen estate, which empowered it to enter an order directing Dr. Görg to collect the estate's assets. Petitioners have not questioned that the local courts in Germany are the courts charged with adjudicating insolvencies, appointing trustees, and prescribing their duties.

Third, Petitioners have never argued a lack of harmony exists between the German judicial system and the fundamental concepts of justice recognized by United States law. Additionally, United States courts in the recent past have recognized the compatibility between the

German and American systems and have extended comity to decisions of German courts. *See, e.g., Metzeler v. Bochard Transp. Co. (In re Metzeler)*, 78 Bankr. 674 (Bankr. S.D.N.Y. 1987) (holding that provisions of German bankruptcy law governing preference and fraudulent transfer actions provided a sufficient basis to permit ancillary administration under 11 U.S.C. § 304).

Finally, the recognition and enforcement of the German Court Orders is not violative of the public policy of Georgia or prejudicial to the interests of Georgia. To the contrary, Georgia has no interest in disputes arising from transactions and contracts made and performed in Germany and governed by German law. If such claims were litigated, all evidence required for resolution would have to be obtained from witnesses residing in Germany and all written evidence would have to be translated from the German language. Furthermore, the adjudication of the German Law Claims would present complicated issues of German law involving the priority and validity of such claims as well as their amounts. No policy or interest of the State of Georgia favors expending its judicial resources in such a manner.

On the contrary, Georgia does have a legitimate interest in preventing forum shopping, denying assistance to claimants attempting to circumvent the law applicable to their claims as interpreted and decreed by the appropriate courts of the country whose laws are applicable to such claims, and in preventing more affluent claimants from achieving an unfair advantage over other similarly situated claimants who cannot afford to relitigate their positions abroad. Furthermore, Georgia has a legitimate interest in ensuring fair treatment of creditors whose claims arose locally and are governed by local law. Recognizing those legitimate interests and also the cost-effectiveness of litigating Local Law Claims here rather than in Germany, Dr. Görg has agreed that the Local Law Claims should be paid in full, provided the balance

of the Georgia assets are turned over to him pursuant to the German Court Orders for distribution in the German bankruptcy in accordance with German law.

CONCLUSION

The Georgia courts in granting summary judgment to Dr. Görg and the Georgia Administrator violated no provision of the Constitution, the Treaty or any of the laws of the United States. On the contrary, the decisions below were based upon adequate and independent state law grounds. Specifically, accepted state procedural rules were followed regarding Petitioners' failure to present evidence properly, and Georgia precedents involving choice of laws and the recognition and enforcement of foreign judgments were applied. It is clear that review by this Court would be inappropriate and is unnecessary. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Certified German-English Translation

71 N 641/85

AMTSGERICHT KOELN
COLOGNE LOCAL COURT
FEDERAL REPUBLIC OF GERMANY
(COURT OF FIRST INSTANCE HAVING
JURISDICTION)

COURT ORDER

Re the estate of the late

Heinz Guenter Kaussen, M.B.A., deceased on April 14/15, 1985, last residence: Neusser Str. 30-32, 5000 Cologne 1, Federal Republic of Germany,

—Administrator: Hermann Haeck, CPA and Tax Consultant, M.B.A., address: Mariawaldstr. 9, 5000 Cologne 41, Federal Republic of Germany;

—Co-Administrator: Dr. Karl Heinz Maus, CPA and Tax Consultant, M.B.A., address: Bartmannstr. 32, 5020 Frechen, Federal Republic of Germany.

Upon petition of the Administrator, bankruptcy proceedings shall commence as of this date, January 24, 1986, 9 a.m. because the estate is over-indebted (Paragraph 215, Bankruptcy Act).

Dr. Klaus Hubert Goerg, Attorney at Law, Theodor-Heuss-Ring 62, 5000 Cologne 1, Federal Republic of Germany, Tel. 0221/120141, is herewith appointed as Trustee in Bankruptcy.

Claims against the decedent's bankrupt estate shall be filed with the Court by *March 5, 1986.*

A court order re: the retention of the appointed Trustee or the appointment of a new Trustee, the appointment of

a committee of creditors, the sale of immovables by private sale, the deposit of money, securities and valuables and other items listed in Paragraphs 132, 134 and 137 of the Bankruptcy Law shall be passed

on *Friday, March 7, 1986, 10:30 a.m.*

The examination of the claims filed shall take place on

Wednesday, June 25, 1986, 10:00 a.m.

Place: Cologne Local Court, Reichenspergerplatz 1,
Ground Floor, Rm. 18,
Federal Republic of Germany.

Those in possession of any item of the decedent's bankrupt estate, or those owing the latter, shall not deliver or pay anything to the heiress, Mrs. Ingeborg Skowronek, M.B.A., Cologne, FRG, or to any other heirs recognized under the legal system of a foreign country, or to the Administrator. Such persons shall report the possession of any property as well as any claims, for which separate realization is sought, to the Trustee by

March 5, 1986.

The heiress, any heirs recognized under the legal system of a foreign country and their curators, and any persons authorized to administer and use the property in the Federal Republic of Germany and abroad, and any other persons authorized to dispose of the property shall report any and all property (things and rights) which was part of the estate on April 14/15, 1986, and any and all property subsequently added to the estate or removed from the estate to the Trustee. The heiress and any heirs of the late Heinz Guenter Kaussen, M.B.A., recognized under the legal system of a foreign country, or the curators representing them shall grant the Trustee all powers of attorney permitting him under the laws of the respective state of situs to take possession of the deceased's property located abroad and constituting part

of the decedent's estate and to use such property to the benefit of the creditors in the Federal Republic of Germany and abroad.

Inasfar as succesison by inheritance has occurred under the laws of this state or of a foreign state, the rights of the heiress, the heirs or an administrator to dispose of movables and immovables of the estate are no longer in effect due to the universal effect of the commencement of bankruptcy proceedings (BGHZ ((Federal Supreme Court of Justice For Civil Cases, a collection of published decisions)) 68, 16, 17; 88, 147, 150). The same applies to powers of attorney applicable to the sale or encumbrance of real property or property rights abroad or disposals of movables. Subject to the recognition by the respective foreign legal system, the bankruptcy sequestration shall also include the proceeds of property of the deceased located abroad which is part of the decedent's bankrupt estate, irrespective of whether any special administration with respect to the decedent's property located abroad has already been ordered in the foreign country under the laws of that respective country.

A mail, telephone and telegraph ban is herewith decreed. This ban shall not extend to communications by the courts, public prosecutor's offices or the Trustee's offices.

The members of the preliminary committee of creditors shall be:

1. Dr. Herbert Heidland, Attorney at Law, Antwerpener Str. 2, 5000 Cologne 1, FRG
2. Wolfgang Kellert, Bank Director, Schumannstr. 9, 5090 Leverkusen, FRG.
3. Bayerische Hypotheken- und Wechsel-Bank Aktiengesellschaft, represented by Board members Dr. Hans Fey and Dr. Klaus Geiger, Theatinerstr. 11, 8000 Munich 2, FRG.

Cologne, FRG, January 24, 1986

Local Court, Dept. 71
Dr. Uhlenbruck
Judge, Local Court
Executed by:
(Signed)
Court Clerk (Court Seal)

APPENDIX

The Hague Convention dated October 5, 1961

1. Country: Federal Republic of Germany

   This official document

2. is signed by
   Ms. Iske

3. in her capacity as
   Court Clerk.

4. It bears the stamp of the Cologne Local Court No. 638
   Certified

5. in Cologne, FRG,

6. on January 31, 1986

7. by the Vice President of the Landgericht (Regional Court)

8. No. 910 E-249.

9. (Seal)

10. Signature (Signed) Schmitz

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
ANNE E. HARLAND
Translator/Interpreter
Accredited by U.S. Dept. of State
733 Courtenay Dr. NE
Atlanta, GA 30306

APPENDIX B

Certified German-English Translation

19 T 58/86

COLOGNE REGIONAL COURT
(LANDGERICHT KOELN)

FEDERAL REPUBLIC OF GERMANY

DECREE

In the bankruptcy proceedings

in the estate of the late H.G. Kaussen, M.B.A., last place of residence: 5000 Cologne 1, Neusser Strasse 30-32, FRG,

—Trustee in Bankruptcy: Dr. K.H. Goerg, Attorney at Law, Cologne,

to which Mrs. Ingeborg Skowronek, 5000 Cologne 1, Neusser Strasse 30-32, FRG, is a party, as Heiress and Appellant,

Counsel: Dr. Hartstang and Partners, 4300 Essen 1, Zeunerstrasse 32, and Koch II and Partners, Cologne, FRG,

on February 17, 1986, the 19th Division for Civil Matters of the Cologne Regional Court held and ruled as follows on the special appeal (filed within a certain time limit) by the heiress filed on February 5 and 7, 1986, respectively, of the decree of the Cologne Local Court dated 1-24-86, file #71 N 641/85, served upon the heiress on January 28, 1986:

1. The appeal is dismissed at the cost of the heiress.

2. Due to obvious incompleteness, the decree of the Division dated January 9, 1986, file # 19 T 8/86, shall be corrected to the effect that the heiress shall bear the costs of the appeal proceedings 19 T 8/86.

Grounds for the Decision:

The special appeal which was filed in due form and time had to be dismissed, with cost consequences in accordance with § 97, German Code of Civil Procedure (ZPO). It is not justified by the facts. The Bankruptcy Court rightly commenced bankruptcy proceedings of the decedent's estate under § 215 and following of the Bankruptcy Act (KO). The fact of the matter is, documented by the appraisals submitted, that the estate is over-indebted.

The appeal of the decree to commence bankruptcy proceedings is dismissed.

The administrator had filed a petition in accordance with the provisions of § 1980 and 1985, German Civil Code (BGB). Administrator Haeck filed this petition with the Court Clerk's office on 11-13-85.

Co-administrator Dr. Maus' participation in filing a petition in bankruptcy was not required for it to be effective. The position of a co-administrator is purposely not mentioned in the provisions of § 1960 and following of the German Civil Code (BGB). Occasionally, in cases involving large or complex estates, a co-administrator is appointed much like a controlling guardian under § 1799 and following, German Civil Code, as a type of controlling body having enumerative functions of approval (compare § 1809-1816, 1818-1824, German Civil Code). The above-mentioned cases of approval in the law concerning wards cannot be applied to estates ipso iure. As in the estate law one or several such provisions are lacking, the duties of the co-administrator can be understood only in such a way that he has certain controlling and cooperative functions, without having authority to make independent decisions. Naturally he can, if he disapproves of the management of the administrator, turn to the Probate Court in order to have orders issued to the administrator.

Due to the consequences as to liability and criminal law of an omission of filing, he is unable to keep the administrator from filing when an act of bankruptcy exists. The legal position could be evaluated differently only if several administrators had been appointed as equal administrators (also see Jaeger/Weber § 217-220, Bankruptcy Act, marginal note 10).

In essence, however, the issue of whether a joint filing is necessary is irrelevant, because co-administrator Dr. Maus and Mr. Haeck, C.P.A., appeared before the Court Clerk of the Local Court and declared that bankruptcy proceedings had to be commenced. The fact that the petition in bankruptcy was not recorded by Dr. Maus, is irrelevant under the law, because Dr. Maus expressly agreed with the petition, not only the same day, but also at later dates.

As the negative function of the controlling guardian is limited to denying approval of legal transactions of the guardian requiring approval, nothing more can be required from the co-administrator. However, as Dr. Maus has granted his approval of the petition for bankruptcy of the administrator, the effectiveness of this petition is unchallenged.

The notification of a defect by the heiress, i.e., that she had not been granted sufficient right to be heard, lacks any factual basis.

The Division concurs with the Bankruptcy Court that due process of law must be granted in bankruptcy proceedings as well (see H.J. Maintzer, "Granting of Due Process in Bankruptcy Proceedings," KTS 1985, 617 and following). According to the general opinion reflected in the literature and consistent court rulings, bankruptcy commencement proceedings are summary (expedited) proceedings which do not tolerate suspension or deferment (exception: § 46, Composition Rules (Vg10)). The debtor or any other third party is not entitled to receive due process of law

prior to every decision concluding the proceedings (also see Maintzer, KTS 1985, p 623).

The urgency of any bankruptcy proceedings has the necesary consequence that any involved party, after having been notified of the petition for bankruptcy, must, at any subsequent point in time, practically count on the commencement of the bankruptcy proceedings or the rejection of commencement due to a lack of bankrupt's assets (Maintzer, as cited).

A further consideration is that the acts by judges performed in the course of the bankruptcy commencement proceedings only serve the purpose of securing the potential bankrupt estate and determining its value as the basis for decision under the bankruptcy law. For those parties to the petition proceedings involved even in the remotest sense have no further control over its continuation—at least not in the sense, as is the case in a standard law suit, that they could influence the proceedings in a formative, expediting and delaying manner. Thus, their claim to be granted due process of law is reduced, which is to be subordinated to the specific requirements of these global and expedited enforcement proceedings.

This issue, however, need not be dealt with in further detail at this point:

In the case at hand, the heiress was granted ample opportunity to comment on the sequestration report. The opportunity for comment already existed on the basis of an appraisal (expert opinion) prepared by co-administrator Dr. Maus on October 1, 1985. In this appraisal, which constitutes part of the estate files, Dr. Maus arrived at an over-debtedness in the amount of DM 19,962,090.00. Dr. Maus used the same basis of valuation in this appraisal as the sequestrator at a later date. The consequences of such appraisal, including those with respect to the duties with respect to the petition for bankruptcy proceedings, had to be known to the heiress

and her counsel. There would have been ample opportunity to comment on the findings arrived at by Dr. Maus prior to the petition for bankruptcy filed by Mr. Haeck, CPA. It is thus determined that on the basis of Dr. Maus' appraisal, the parties involved in the proceedings were aware of the fact of the alleged over-indebtedness since October, 1985.

Even immediately prior to the issue of the appealed decree, the heiress was not entitled to be heard further. The contents of the files and the numerous and detailed briefs of the heiress contained therein demonstrate very clearly that the heiress was granted the right to be heard and was, in fact, granted it quite generously. Upon her request the heiress was informed that in order to check the basis for valuation used in the appraisals solicited to date, a further appraiser had been appointed by the Bankruptcy Court ex officio in order to make absolutely sure that no mistake was contained in the appraisals prepared up to that date by experts Dr. Goerg and Dr. Maus, and if so, to define it. Therefore the heiress was indeed sufficiently informed. Due to the urgency of the decree which had to be issued by the Bankruptcy Court, she should have and must have expected the decision following the receipt of the Weyers appraisal. What is more, the bankruptcy judge expressly pointed this very consequence out to one of the heiress' counsel in a meeting on 1-15-86, as is reflected in a memo dated 1-24-86. One can hardly imagine that the Appellant could have been granted more due process of law than was granted in this specific case.

Finally, a further delay of the decision on the commencement of bankruptcy proceedings by having granted further rights to be heard was not justified because of the inevitable decline in value of the estate which was addressed in the Weyers appraisal.

One of the reasons why this is justified is the fact that the heiress is not entitled to the right to petition for

bankruptcy, her being only an indirect party to the commencement of bankruptcy proceedings. The issue of whether the heirs were entitled at all to be heard in the course of the commencement of bankruptcy proceedings on the estate upon petition of the administrator or curator was rightfully left open. In any case, the due process granted thus far appears sufficient to adequately safeguard the interests of the sole heiress with respect to the assets in the FRG and abroad. Her claim to be heard can definitely not justify the commencement of the proceedings, which is economically imperative, being delayed even further, e.g., because of a splitting up of the estate into domestic and foreign property. The appraisal submitted by Prof. Sandrock shows that under international private law the heiress can freely dispose of foreign assets to a large degree. It is in the urgent interest of the creditors in implementing liability to terminate the splitting of the estate created by the international private law and to achieve uniform coverage of the bankrupt's estate because of the existing over-indebtedness. This interest takes absolute priority over the personal interest of the heiress in being able to dispose of the foreign assets. The law has provided the administrator with sole authority and responsibility with respect to his duty to petition bankruptcy proceedings. The administrator is not obligated either to grant due process to the heirs prior to his petition for bankruptcy proceedings. If the heir or heirs received more than adequate due process, thus having the opportunity to prevent the decision on a petition for bankruptcy proceedings duly issued by the administrator and co-administrator by means of constant appeals, the duty of the administrator to file such petition as an independent legal duty would in effect be totally invalidated. The heiress had the opportunity at all times to appeal the petition for bankruptcy proceedings by Mr. Haeck, CPA, by filing for his termination with the Probate Court, for example. If the petition for bankruptcy proceedings was filed despite a lack of cause for

opening bankruptcy proceedings, for which Administrator Haeck was responsible, this is solely an issue of the administrator's liability. In terms of the commencement of bankruptcy proceedings, it is not the heiress who is a party, but the administrator. It was he who claimed the existence of over-indebtedness of the estate when submitting his petition and proved this upon the court's request by corresponding documentation. Its accuracy, in turn, has been confirmed by the appraisals of the experts.

While the heiress in her notice of appeal makes reference—very carefully at this time—to the non-existence of estate over-indebtedness, which is required for commencement of bankruptcy proceedings under the law, this is not applicable according to the appraisals of Dr. Goerg, Dr. Maus, and Weyers. We refer to these appraisals. They are known to the heiress. Certain valuation criteria used by the appraisers can, in fact, be seen more critical. However, this does not change the fact which exists beyond any doubt on the basis of the three appraisals and to the satisfaction of this court that the estate is over-indebted. This Division of the Court, in fact, harbors the general fear—beyond the valuation used by the appraisers—that the appraisers used valuation standards based on the assumption of normal economic conditions on the real estate market. If, however, this real property must be utilized in order to realize the value it represents in order to cover the debts, this will mean a flood of additional real property on a market that has already been over-saturated in recent years, which, in turn, is bound to result in drastic price reductions specifically of the type of real property that represents the major value of the estate. This expectation is by no means utopic. Even at this time, numerous letters of interested parties which are contained in the files demonstrate that real estate brokers, purchasers and speculators count on acquiring real property at low prices in connection with the rumors of estate bankruptcy proceedings or knowing that such proceedings have been commenced.

Furthermore, the considerations of the heiress with respect to the value and non-overindebtedness of the estate have partially lost their basis because of the Weyers appraisal. As mentioned above, the appraisal was solicited in order to enable the bankruptcy court to satisfy itself that the valuation basis submitted by Dr. Maus and Dr. Goerg contained no errors or was at least justifiable. On the basis of the convincing Weyers appraisal, the bankruptcy court determined that any valuation basis applied by the parties in these proceedings in evaluating the domestic real property was bound to result in overindebtedness. Furthermore, the amount of the debts of the estate will increase by at least another DM 25 million because of the probable commencement of bankruptcy proceedings with respect to the Westaufbau assets. Due to the delay in the commencement of bankruptcy proceedings, further losses have been incurred by the estate in the meantime, particularly in view of the constant increase in liabilities. The creditors of the estate are entitled to the bankrupcy court's ensuring that a further decline in value of the available assets is avoided by taking suitable measures and dealing with the proceedings expeditiously.

The problem of which items of the estate are part of the bankrupt estate and which are not, is entirely irrelevant with respect to the commencement of bankruptcy proceedings, i.e., whether, in the opinion of the heiress, this issue is based on the principle of territoriality, or on the principle of universality.

On page 5 of her appeal, the heiress raises the question whether the bankruptcy judge had ". . . jurisdiction at all, and if so, to what extent, to rule as reflected in the decree of 1-24-86." This question has been duly and clearly answered above: The estate is in fact overindebted; the administrator in fact filed a petition for bankruptcy; therefore, the bankruptcy court had to commence bankruptcy proceedings, independent of any further considerations by the heiress.

The further questions as to what authority the trustee in bankruptcy and what duties the heiress have with respect to the foreign assets, refer—if at all—to the implementation of the estate bankruptcy proceedings, the opportunities of incorporating further items of the estate in the bankrupt estate, and to the duties of cooperation of the heiress in this effort. They do not relate, however, to the preceding act of commencement of bankruptcy proceedings. As a result, they are of no significance to the decision of this issue.

As the decision of the Division of the Court dated 1-9-86, file # 19 T 8/86 does not contain a decision as to costs, in deviation from the reasons given therefor, it had to be corrected officially by corresponding application of § 319, German Code of Civil Procedure (ZPO).

In accordance with the statements made in the decision dated 1-9-86, no amount in controversy can be determined for the appeal at this time.

Neumann Boenicke-Dierdorf Mueller

Executed: (Signed) Court Clerk (Seal of the Cologne Regional Court)

* * * *

Certified to be a faithful and complete translation of the German text.

6-15-86

/s/ Anne E. Harland
ANNE E. HARLAND
Translator/Interpreter
Accredited by U.S. Dept. of State
733 Courtenay Dr. NE
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APPENDIX C

Certified German-English Translation

COLOGNE HIGHER REGIONAL COURT
((OBERLANDESGERICHT KOELN))

Federal Republic of Germany

DECREE

2 W 34/86
19 T 58/86 Cologne Regional Court
71 N 641/85 Cologne Local Court

In the bankruptcy proceedings

re the estate of the late H.G. Kaussen, M.B.A., last place of residence: Neusser Strasse 30-32, 5000 Cologne 1, Federal Republic of Germany,

—Trustee in Bankruptcy: Dr. K.H. Goerg, Cologne,

party to the proceedings:

Mrs. Ingeborg Skowronek, Neusser Strauss 30-32, 5000 Cologne 1, FRG,

as Heiress and Appellant,

Counsel: Dr. Hartstang and Partners, Attorneys at Law, Zeunerstrasse 32, 4300 Essen 1, FRG,

the 2nd Division for Civil Matters of the Cologne Higher Regional Court, by Judges Dr. Schmitz, Dr. Schneider and Dr. Pretzell, upon the special further appeal (subject to a time limit) by the Appellant of February 20, 1986, from the decree issued by the 19th Division for Civil Matters of the Cologne Regional Court dated February 17, 1986, which appeal was filed with this Court on February 21, 1986, has on March 3, 1986, decreed and held as follows:

I. The special further appeal shall be dismissed as inadmissible to the extent that it is directed against the following:

1. the decision by the Cologne Local Court re the commencement of the bankruptcy proceedings on the estate;

2. the court orders of the Local Court:

   a. with respect to the Appellant's duty to provide information;

   b. with respect to the reference by the Local Court to the legal consequences of commencement of the bankruptcy proceedings;

   c. with respect to the reference by the Local Court to the legal consequences of bankruptcy sequestration for the use of foreign assets which are part of the bankrupt estate.

II. Re the special further appeal from the following court orders:

1. the Appellant's obligation to grant power-of-attorney;

2. the expiration of existing powers of attorney;

3. the postal, telephone and telegraph ban, a decision will be issued by the 2nd Division for Civil Matters in its final decision.

Grounds:

I.

By decree of January 24, 1986, the Cologne Local Court commenced bankruptcy proceedings on the estate of Heinz Guenter Kaussen, deceased in April of 1985, and appointed Dr. Goerg, Attorney at Law, Cologne, as the Trustee in Bankruptcy. The decree contains court orders as follows:

1. Those in possession of any item of the decedent's bankrupt estate, or those owing the latter, shall not de-

liver or pay anything to the heiress, Mrs. Ingeborg Skowronek, M.B.A., Cologne, FRG, or to any other heirs recognized under the legal system of a foreign country, or to the Administrator. Such persons shall report to the Trustee in Bankruptcy the possession of any property as well as any claims, for which separate realization is sought by secured creditors, by March 5, 1986.

2. The heiress, any heirs recognized under the legal system of a foreign country and their curators, and any person authorized to administer and use the property in the Federal Republic of Germany and abroad, and any other person authorized to dispose of the property shall report any property (things and rights) which was part of the estate on April 14/15, 1985, and any property subsequently added to the estate or removed from the estate, to the Trustee in Bankruptcy.

3. The heiress and any heirs of the late Heinz Guenter Kaussen, M.B.A., recognized under the legal system of a foreign country, or the curators representing them shall specifically grant the Trustee in Bankruptcy all powers of attorney permitting him to take possession of the deceased's property located abroad, constituting part of the decedent's estate under the laws of the respective state of situs and to use such property to the benefit of the creditors in the Federal Republic of Germany and abroad.

4. Inasfar as succession by inheritance has occurred under the laws of this state or of a foreign state, the rights of the heiress, the heirs or an administrator to dispose of movables and immovables of the estate are no longer in effect due to the universal effect of the commencement of bankruptcy proceedings (BGHZ (Federal Supreme Court of Justice for Civil Cases, a collection of published decisions) 68, 16, 17, 88; 147, 150). The same applies to powers of attorney applicable to the sale or encumbrance of real property or property rights abroad

or disposals of movables. Subject to the recognition by the respective foreign legal system, the bankruptcy sequestration shall also include the use and the proceeds derived from the decedent's property located abroad which is part of the decedent's bankrupt estate, irrespective of whether any special administration with respect to the decedent's property located abroad has already been decreed in the foreign country under the laws of that respective country.

5. A mail, telephone and telegraph ban is ordered. This ban shall not extend to communications by the courts, public prosecutor's offices or the Trustee's offices.

The heiress of the decedent, represented by Attorney-at-Law Koch, Cologne, filed a special appeal from this decree on February 5, 1986, on the grounds that proof for the over-indebtedness of the estate had not been furnished.

Represented by Dr. Hartstang and Dr. Grote, Essen-Bredeney, Attorneys at Law, the Appellant filed a second special appeal, which was received on February 5, 1986, petitioning that:

"the decree appealed be amended and reversed, or that alternatively, the decree be partially amended and reversed in accordance with the law."

The Appellant cited the following grounds for this second appeal:

That the decree of the Cologne Local Court is based on a violation of the right to be heard because the Appellant had not been informed of a comment made by the present Trustee.

That she had further been denied an opportunity to have the appraisal by Mr. Weyers, Department Chief, dated January 24, 1986 explained verbally. In view of the contents of the appraisal, the Appellant claims, this was imperative.

The court orders issued by the Local Court, she further claims, are not confirmed by law nor by any supreme court precedents and contain errors of law. An appeal, the Appellant claims, must clarify specifically:

1. what authority the Trustee has with respect to the foreign assets;

2. what duties the Appellant has with respect to the foreign assets; and

3. whether the bankruptcy judge had jurisdiction at all and if so, to what extent?

For the legal claims made by the Appellant, we refer to the grounds stated in the brief dated 2-3-86, pages 5 to 21, sheet 853 through 869 of the files.

By decree of February 17, 1986, the Cologne Regional Court dismissed the special appeal and decreed under subpara. 2 of the operative provisions:

"The appeal is dismissed, with the heiress bearing the costs therefor. The decree of the Division dated 1-9-86, file # 19 T 8/86, is corrected due to obvious incompleteness to the effect that the heiress shall bear the costs of the appeal proceedings 19 T 8/86."

The Regional Court stated as follows:

"As, deviating from the grounds stated, the decree issued by the Division dated 1-9-86, file # 19 T 8/86, does not contain a decision as to costs, it had to be corrected officially based upon an analogous application of § 319, German Code of Civil Procedure (ZPO).

On the merits, the Division addressed in detail the appeal from the commencement of the estate bankruptcy proceedings and the violation of the right to be heard under "Grounds for the Decision." Re appeal of the court orders (concerning the commencement of the bankruptcy proceedings), the Regional Court held as follows:

"The further issues as to the authority of the Trustee and the duties of the heiress with respect to the foreign assets refer to, if applicable at all, the implementation of the estate bankruptcy, the opportunity to include further estate items into the bankrupt estate and the cooperative duties of the heiress in this effort. However, they do not refer to the act of commencement of bankruptcy proceedings which was precedent in time. As a result, they are not relevant for the decision of this issue."

The Appellant appealed the decree issued by the Regional Court by means of a special further appeal and filed a petition to the effect that:

the decree appealed be dismissed and amended and at the same time the decree of the Cologne Local Court dated 1-24-86 (71 N 641/85) be dismissed and amended;

alternatively, the above-referenced decrees be dismissed partially and amended in accordance with the law.

The admissibility of the special further appeal was addressed by the Appellant who stated that the appealed decree was based on grave procedural irregularities in that:

a. in the operative part of the ruling, "two" proceedings had been mingled and decreed upon, which was inadmissible, and that

b. no decision had been made on the alternate petition of the Appellant; the petition to revoke the court orders contained in the decree of the Local Court dated 1-24-86 had not been decided upon.

For details, we refer to the "grounds for the further special appeal," page 5 and following = 960 and following of the files.

II.

The further special appeal is partially inadmissible; other than that, the time for its decision is premature. Therefore, a partial advance decision must be made in accordance with the provision of § 301, German Code of Civil Procedure (ZPO), applicable analogously with the appeal proceedings (see Zoeller/Schneider, ZPO, 14th volume, 1984, § 575, marginal note 8). Inasfar as the appeal is admissible, the time for the decision is not ripe because the Trustee must be heard prior to the Division for Civil Matters of the Higher Regional Court taking a decision (Art. 103, paragraph 1, German Basic Law).

1. The Local Court and the Regional Court have arrived at the same results, as demonstrated by the wording of their decrees, so that a new, independent reason for appeal in terms of § 568, paragraph 2, German Code of Civil Procedure, is lacking.

2. Beyond the wording of § 568, subpara. 2 of the German Code of Civil Procedure, case law provides for the admissibility of a further appeal even in the event of concurrent prior decisions, if the appealed decision is based on a grave procedural irregularity (general opinion, confirmed by BVerfGE (Highest Federal Constitutional Court) 49, 255, 256). The appeal of the Appellant on this issue is partially founded.

a. No procedural violation exists in that the Regional Court connected two independent decisions in an outwardly uniform decree. No provision exists in the appeal law and in the general legal principles of proceedings under which this is a violation of the procedural rules. On the contrary, such practice is fairly widely used. It is generally accepted in contentious proceedings, for instance, to issue a decision on the main issue and the amount in controversy for reimbursement of legal fees jointly, with the consequence that the decision concerning the main issue must be appealed based on regular appeal proceedings, whereas the determination of the

amount in controversy contained in the very same document must be appealed based upon an appeal proceeding especially provided for. Furthermore, the decision of the Regional Court to commence bankruptcy proceedings with respect to the estate cannot be based on the lack of a cost decision, which was an oversight, being rectified in another decision.

For clarity's sake, the Division for Civil Matters of this Court has issued a separate decision on the special corrective appeal, i.e., in the court order proceedings 2 W 43/86, decree dated March 3, 1986.

b)

The appeal of the Appellant to the effect that the Regional Court did not decide on the court orders contained in the decree of the Local Court of 1-24-86, is founded. Whether the Division might have missed the petition of the special appeal or whether it might have considered a decision thereon non-essential, cannot be reliably concluded from the grounds for the decision. However, this is of no relevance. The decisive issue is that to the above extent, a decision which was petitioned for and required, was not made. This omission represents a violation of the procedures in that it violates Art. 103, subpara. 1 of the Basic Constitutional Law.

3.

This violation of the procedural rules by the regional court does not mean, however, that the special further appeal is admissible in its entirety. It is admissible only to the extent that the appealed decree can be based on this procedural defect.

a.

The prerequisite for admissibility of any redress is a grievance (see Zoeller/Schneider, German Code of Civil Procedure, marginal note 8 preceding § 511). The exceptional provision § 568, para. 2 of the German Civil

Code is applicable to the procedure of a further appeal. In accordance therewith, not every grievance is sufficient to satisfy the redress requirements, but it must be a grievance arising in the second instance, forming the so-called "new ground for appeal." However, in this respect, too, the procedural principle prevails that the admissibility of a redress is given only to the extent that the appellant has a grievance and wishes to eliminate the latter. For any prior decisions diverting therefrom in the operative part of the decision, this means that a partial appeal, even in application of § 568, subpara. 2 of the German Code of Civil Procedure, results only in a corresponding partial admissibility of the further complaint (see Zoeller/Schneider, German Code of Civil Procedure, § 568, marginal note 15). This limitation also applies inasfar as the law admits the further appeal due to a material procedural defect in the prior instance. To this extent the basic idea of § 568, subpara. 2, German Code of Civil Procedure, and the procedural principle of grievance as a prerequisite for redress must be complied with. The admissibility of the further appeal in the light of concurring prior decisions with grave procedural defects therefore applies only to the extent that the procedural defect could have affected the appealed decision. This qualification is expressed in that only those grave procedural defects will open the further appeal on which the appealed decision can be "based" (see Zoeller/Schneider, ZPO, § 568, marginal note 23).

b) The disregard of the first special appeal by the Appellant with respect to the court orders challenged by her contained in the decree of the Local Court dated January 24, 1986, can be of causal significance for those court orders only that remained undecided. The decision to commence bankruptcy proceedings is simply independent of whether the further court orders of the Local Court are founded or not. In no event can the commencement decision by the Local Court be based on the

omission of a decision, whether the further court orders of the Local Court are founded or not. Therefore, a grievance of the Appellant based upon an alleged grave procedural defect is missing. This is the reason why the further special appeal must be dismissed as inadmissible under § 568, subpara. 2, ZPO.

c.

Other procedural defects with reference to the decision to commence bankruptcy proceedings cannot be found in the files. In this context the Local Court did not overlook any petitions or statements.

d.

The further special appeal is partially inadmissible because of the court orders not decided on, as listed in the reasons for the appeal dated 2-20-86 on page 5 and following = Sheet 960 and following of the files.

aa. The reference of the Local Court to the duty to provide information on the part of the heirs of the decedent only reflects the provisions of § 100, Bankruptcy Act (KO) so that the procedural defect by the Landgericht cannot aggrieve the Appellant.

bb. The order issued to the Appellant to grant power of attorney substantiates a grievance. To this extent the further special appeal is admissible. Whether it is founded, will have to be decided in the concluding decision by the Division for Civil Matters of this Court after the Trustee has had an opportunity to comment.

cc. The statement made by the Local Court to the effect that the authority of the decedent's heirs to dispose had expired as of the effective date of the commencement of bankruptcy proceedings, reflects the provision of the law, i.e., only contains a correct instruction (§ 6, KO). To the extent that any rights of foreign heirs might be affected, this does not affect the Appellant, and she is lacking grievance.

dd. The reference to the expiration of powers of attorney with respect to the sale or encumbrance of foreign real property rights, may require re-examination; the Division will therefore issue a decision thereon in its concluding decision.

ee. The reference to the bankruptcy sequestration also extending to the use and the proceeds of property located abroad reflects a legal consequence and does not constitute a grievance.

ff.

The substantiation of the decision on a mail, telephone and telegraph ban shall be ruled on in the concluding decision.

4.

The decision as to costs and the amount in controversy of the appeal shall be subject to the final decision.

Dr. Schmitz Dr. Pretzell Dr. Schneider

(Court Seal) Executed: Signed (Court Clerk)

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
ANNE E. HARLAND
Translator/Interpreter
Accredited by U.S. Dept. of State
733 Courtenay Dr. NE
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APPENDIX D

Certified German-English Translation

OBERLANDESGERICHT KOELN
COLOGNE HIGHER REGIONAL COURT
FEDERAL REPUBLIC OF GERMANY
COURT OF APPEAL

DECREE

File No. 2 W 34/86
19 T 58/86 LG Koeln (Cologne Regional Court)
71 N 641/85 AG Koeln (Cologne Local Court)

In the bankruptcy proceedings

re the estate of the late H.G. Kaussen, M.B.A., last place of residence: Neusser Strasse 30-32, 5000 Cologne 1, Federal Republic of Germany,

—Trustee in bankruptcy: Dr. K.H. Goerg, Attorney at Law, Cologne, FRG,

involving

Mrs. Ingeborg Skowronek, Neusser Strasse 30-32, 5000 Cologne 1, FRG,

as Heiress and Appellant,

Counsel for the Appellant:

Dr. Hartstang and colleagues, Attorneys at Law, Zeunerstrasse 32, 4300 Essen 1, FRG,

the 2nd Division for Civil Matters of the Cologne Higher Regional Court, by Higher Regional Court Judges Dr. Schmitz, Dr. Schneider and Dr. Kuhne, has on April 28, 1986, upon the special further appeal (subject to a time limit) of the Appellant dated February 20, 1986, filed with the Court of February 21, 1986, against the decision of the 19th Division of Civil Matters of the Cologne

Regional Court dated February 17, 1986, held and decreed as follows:

1. Unless it has already been dismissed by the decision of the Division of Civil Matters of March 3, 1986, the special further appeal shall be dismissed on its merits.

2. The costs of the further appeal proceedings shall be borne by the Appellant.

3. For purposes of a preliminary cost calculation and subject to correction in the course of the proceedings, the amount in controversy of the appeal shall be set at DM (German Marks) 5 million.

Reasons for the Decision

I. By decree of the Cologne Local Court dated January 24, 1986, the bankruptcy proceedings re the estate of the late Heinz Guenter Kaussen, M.B.A., deceased in April 1985, were commenced and court orders given. In its decree of March 3, 1986, the Division of Civil Matters already partially decided on the appeals filed against the latter. For details, please refer to said decision.

The Appellant was given an opportunity to answer the pleading of the Trustee in Bankruptcy of April 7, 1986. Said pleading was sent to her counsel on April 11, 1986. No answer thereto was filed by the date of the decree of the Division of Civil Matters.

II. The legitimacy of the Following orders is now up for decision:

—Duty of the Appellant to grant powers of attorney with respect to the property located abroad;

—Expiration of existing powers of attorney;

—Ban on mail, telephone and telegraph communications.

To the above extent, the special further appeal is dismissed on its merits.

1. The Division of Civil Matters agrees with the opinion of the previous instances that the Appellant has the duty to grant the Trustee power of attorney with respect to the real property of the late H.G. Kaussen, M.B.A., located abroad.

The dispute as to whether the so-called principle of territoriality or the so-called principle of universality shall prevail in the bankruptcy proceedings, i.e., whether the bankruptcy commenced in the Federal Republic encompasses the entire property of the Debtor—irrespective of its situs—, was in recent rulings of the Federal Court of Justice ruled on in favor of the principle of universality, which the Division of Civil Matters of this Court agrees with (BGHZ 68, 16; further references in Kuhn/Uhlenbruck/Lueer, Bankruptcy Act, 10th Volume, 1986, Paragraphs 237, 238 Rn. (marginal number) 17, and BGH (Federal Court of Justice), EWiR, Paragraph 237, Bankruptcy Act 1/85, 605 (Merz)=ZIP, 1985, 944). This means:

In addition to the domestic property, the Debtor's bankrupt estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee (BGHZ 68, 17). Any duties of the Debtor in handling the bankruptcy proceedings shall therefore also include the property located abroad.

In administering and using the bankrupt estate, the Debtor is subject to a large number of cooperative duties. He shall do everything required in order for the Trustee to fulfill his duties under Paragraph 117, subpara. 1 of the Bankruptcy Act. He shall inform the Administrator, the committee of creditors and, upon the court's order, the creditors' meeting of all circumstances concerning the proceedings (Paragraph 100, Bankruptcy Act), and he shall be responsible, unlike the several debtor in an execution (a foreclosure), not only for tolerating the foreclosure of his property, but for the active surrender of the

bankrupt estate. Paragraph 117 of the Bankruptcy Act provides for a claim of surrender by the Trustee against the Debtor and obligates the latter to initiate any action required for the Trustee to fulfill his duty of taking possession of the bankrupt estate (Boehle-Stamschraeder/ Kilger, Commentary on Bankruptcy Act, 14th volume, Paragraph 117, marginal no. 2; Jaeger-Weber, commentary on Bankruptcy Act, 8th volume, Paragraph 117, marginal no. 3 and following; and Hanisch in ZIP, 1980, p 170 and following). Accordingly, the foreclosure against the Debtor on the basis of the decree to commence bankruptcy proceedings is a surrender foreclosure in terms of Paragraphs 883 and following, Code of Civil Procedure (ZPO) (Jaeger-Weber as cited, marginal no. 13, with further references). This means imperatively that the Debtor is also obligated to enable or facilitate the Trustee's duty to fulfill his responsibilities under Paragraph 117, subpara. 1, Bankruptcy Act, by granting powers of attorney. As the Trusteee has the duty, however, to use the Debtor's property located abroad, the further conclusion is imperative that the Debtor has the duty to grant powers of attorney accordingly. This appears to be the unanimous opinion of the literature (see documentation by Kuhn/Uhlenbruck, Bankruptcy Act, Paragraph 117, marg. no. 13a, and Kuhn/Uhlenbruck/ Lueer as cited, Paragraph 237 and 238, marg. no. 65).

To the extent ascertainable, only the Koblenz Higher Regional Court has a legal opinion contrary thereto (KTS 1980, 68). The Koblenz Higher Regional Court also assumes that the Debtor's property located abroad is part of the bankrupt estate and that the Debtor's duty to provide information under Paragraph 110, Bankruptcy Act, extends to the Debtor's property located abroad. In the opinion of the Koblenz Higher Regional Court, however, a provision is lacking which would obligate the Debtor to grant power of attorney beyond the duty to provide information. In view of the comprehensive duty of the

Debtor to cooperate, however, such a specific provision is not required so that because of its lack, one cannot conclude that the Debtor is not obligated to grant power of attorney. In fact, the reverse is true. Particularly in view of the difficulties in practice which the use of the property located abroad presents (also see BGHZ 68, 17/18; Kuhn/Uhlenbruck/Lueer, Bankruptcy Act, Paragraphs 237, 238, marg. no. 7 and following) and which the Trustee may be confronted with, the basic duty of the Debtor to cooperate comes to bear. It is beyond any doubt that the granting of a power of attorney to the Trustee for the disposition of property located abroad represents a considerable facilitation in his compliance with his duties under Paragraph 117, subpara. 1, Bankruptcy Act.

The fact that the Trustee already has the right of administration and disposition of the bankrupt estate by virtue of the law (Paragraph 6 of the Bankruptcy Act) and such right extends to property located abroad, does not contradict the above. As the principle of universality is not recognized by all states, the Debtor cannot invoke that the granting of a specific power of attorney is unnecessary under German law. The actual circumstances encountered by the Trustee determine the extent to which the Debtor has the duty to cooperate in order to enforce claims for obtaining and using property located abroad covered by the bankruptcy proceedings. If the presentation of the adjudication order does not suffice for evidence of authority of the Trustee, then the Debtor must take all necessary steps of his own so that the intent of Paragraph 6 of the Bankruptcy Act becomes effective abroad as well.

2. A further legal consequence is derived from the above in that the rights of the heiress or any other person authorized to dispose of the property constituting part of the estate has expired, which includes the property located abroad.

3. The ban on mail, telephone and telegraph communications ordered by the Local Court is provided by Para-

graph 121, Bankruptcy Act. No considerable legal concerns with respect to this order are apparent.

4. The decision re costs is based on Paragraph 97, subpara. 1, Code of Civil Procedure (ZPO).

The Division of Civil Matters has deemed it necessary to determine an amount in controversy of the appeal at this time based entirely on a free estimate in order to permit preliminary cost accounting.

Dr. Schmitz Dr. Kuhne Dr. Schneider

(Seal of the Cologne Higher Regional Court)

Executed by:
(Signed)
Court Clerk

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
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Translator/Interpreter
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APPENDIX E

Certified German-English Translation

Federal German Constitutional Court
—1 BvR 574/86

In the Proceedings
Regarding
The Constitutional Complaint

Brought by

1. Mrs. Ingeborg Skowronek
   Bodinusstrasse 5, Cologne 60, Federal Republic of Germany (FRG),

2. the minor Beatrix Kaussen,

3. the minor Margret Kaussen,

4. the minor Eva-Maria Kaussen,

5. the minor Hilde Kaussen,

—the parties 2 through 5 being represented by their mother, the party 1—

—Counsel: Dr. Gerhard Hartstang and
Dr. Thomas Grote,
Attorneys-at-Law,
Zeunerstrasse 32, Essen-Bredeney, FRG—

against a) decree issued by the Cologne Higher Regional Court on April 28, 1986—2 W 34/86—,

b) decree issued by the Cologne Higher Regional Court on March 3, 1986—2 W 34/86—,

c) decree issued by the Cologne Regional Court on February 17, 1986—19 T 58/86—,

d) decree issued by the Cologne Local Court on January 24, 1986—71 N 641/85—

and application to issue an injunction,

the 2nd Panel of the First Division of the Constitutional Court, by Court Vice President Herzog and Judges Katzenstein and Henschel, has on June 6, 1986, unanimously decreed and held as follows:

> The Constitutional Complaint shall not be accepted for decision by this Court, in part as being inadmissible, in part as lacking an adequate chance of being successful. Likewise, the application for the issuance of an injunction will not be accepted.

Grounds:

Pursuant to § 90, paragraph 2, sentence 1, BVerfGG; (Law on Proceedings of Constitutional Court), it is a prerequisite of a constitutional complaint that all means to appeal have been exhausted. This prerequisite has not been complied with by the parties 2) through 5). In contrast to party 1), the parties 2) through 5) did not appeal the decree issued by the Cologne Local Court in the manner provided by law. The Constitutional Complaint therefore proves to be inadmissible.

The Constitutional Complaint is also inadmissible to the extent it is directed against the institution of the bankruptcy proceedings and those other decrees as affirmed by the decree issued by the Cologne Higher Regional Court on March 3, 1986, which decree is also subject to this complaint. In that regard, the party 1) failed to file the Constitutional Complaint within the time period mandated by § 93, paragraph 1, BVerfGG. The one-month period started running prior to April 28, 1986, the date on which the decree was issued by the Cologne Higher Regional Court, because the preceding decree by that court already qualified as a decision partially concluding the proceedings.

To the extent that the Constitutional Complaint is admissible, it is without merit. The challenged decrees do not violate constitutional rights. The decrees remain within the restraints imposed on the judge by the constitutional principle of separation of powers in his interpretation of the law (Art. 20, paragraph 3, GG (Federal German Constitution)). By consistent practice, the Constitutional Court has recognized the courts' duty and right to further develop the law (*See* BVerfGE 65, 182 [190], as amended). The limits are exceeded only when a clear legislative objective to the contrary is present (*See* BVerfGE 9, 89 [102]). This is not the case. According to the law, the Cologne Higher Regional Court was allowed to base its interpretation of the law primarily on the so-called universality principle, which is explicitly codified in § 1, paragraph 1, KO (Federal German Bankruptcy Code) (*See* BGHZ 88, 147 [150] as amended). The Bankruptcy Code cannot unequivocally be read to confine the debtor's duties to compliance with the obligations specifically stated in §§ 100, 101, KO. The purpose of the bankruptcy proceedings and the bankruptcy trustee's comprehensive authority to realize assets (§ 117, paragraph 1, KO) imposes a general obligation on the debtor to confer power of attorney inclusive of assets located in a foreign country.

The Constitutional Court is not to examine whether such interpretation by the Cologne Higher Regional Court is "correct" in terms of ordinary civil law. While the Koblenz Higher Regional Court shares the opinion advocated by the party 1), the Cologne Higher Regional Court, contrary to the complainant's position, was not bound by such opinion. Inconsistent interpretation of the law by different courts does not constitute a violation of Art. 3, paragraph 1, GG (BVverfGE 1, 332 [345]). A violation of the principle of equal treatment could only be taken into consideration if, according to sound interpretation of the principles expressed by the Constitution,

such defective application of law were incomprehensible and likely to be based on inappropriate considerations. (*See* BVerfGE 59, 128 [160 et seq.]). There is, however, no indication to that effect.

Art. 6, paragraph 1, GG has also not been violated. The separation of the complainant from her children was based on her own independent decision. Although, according to the complainant, her being abroad is the result of the order to confer power of attorney, this is only an unintended side-effect of the institution of the bankruptcy proceedings from which Art. 6, paragraph 1, GG does not afford constitutional protection. (*See* BVverfGE 6, 55 [77]; 12, 151 [176]).

Furthermore, the obligation to confer power of attorney does not violate complainant's constitutional right granted by Art. 14, paragraph 1, GG. The Constitutional Court has already held with respect to § 6, paragraph 1, KO that this provision defines the legal substance of property in terms of Art. 14, paragraph 1, sentence 2, GG (*See* BVerfGE 51, 405 [408]). This also holds true with respect to the obligation to confer power of attorney, which obligation has been lawfully derived by the competent courts from the law. In addition, the complainant's just concerns are protected by the opportunity to bring suit in order to obtain a separation or substitutional separation of assets from the estate in the event that any compulsory power of attorney should include assets which are not part of the estate (*See* §§ 43, 46, KO).

Furthermore, the order to impose a mail, telephone and telegraph ban does not violate Art. 10, paragraph 1, GG. The order is based on § 121 KO, which is a provision clear of any constitutional misgivings. The complainant failed to submit any facts which might have cast doubt on the legality of the order in her particular case. Besides, should such facts occur, she is entitled pursuant to § 121, paragraph 2, KO to file a petition at any time to have the court remove or limit the ban.

Finally, the Higher Regional Court with its decree of April 28, 1986, did not violate the complainant's right to a fair trial. In view of the fact that the trustee's brief of April 7, 1986, included only legal considerations which did not necessitate the complainant's supplying additional information to her counsel, a period of approximately two weeks prior to the decision by the court is still deemed appropriate.

This decree cannot be appealed.

Dr. Herzog Dr. Katzenstein Dr. Henschel

(Court Seal) Executed: Signed (Court Clerk)

Karlsruhe, June 11, 1986.

Certified to be a faithful and complete translation of the German text.

December 8, 1987

/s/ Anne Harland
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Translator
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APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action No. D-22830

IN RE: ESTATE OF GUENTER KAUSSEN, DECEASED

ORDER

[Filed Apr. 10, 1990]

This matter is presently before the Court on Motions for Summary Judgment filed on behalf of Edgardo Parungao, Administrator CTA of the Estate of Guenter Kaussen (the "Administrator"), and Dr. Klaus Hubert Goerg, the German bankruptcy trustee of the Estate of Guenter Kaussen. Attorneys for the Administrator also seek an award of additional attorneys' fees.

Both Motions for Summary Judgment seek the same relief, to wit: Direction to the Administrator to pay all valid claims filed in Georgia, except claims of German nationals, and to deliver the remaining proceeds of the estate to Dr. Goerg for return to Germany and the determination of the claims of German nationals.

The only objection to the Motions for Summary Judgment have been filed by two German creditors: Dr. Bruno M. Kubler, a German trustee in bankruptcy of two German entities of which Kaussen was a principal, and Bayerische Hypotheken-Wechsel Bank A.G. ("Hypo Bank"), a German bank with claims against the Kaussen estate arising out of numerous transactions in Germany between Kaussen and the bank. The only objection to

the request for additional attorneys' fees was filed by Hypo Bank. After consideration, the Court believes the Motions for Summary Judgment should be granted. Accordingly,

The Administrator is directed to pay in full all valid claims filed with the Administrator in the estate in the amounts allowed by the Administrator for such claims in accordance with the provisions of O.C.G.A. § 53-7-91, except that the Administrator shall not pay any amounts on the following claims:

1. Dr. Bruno M. Kubler;
2. Deutsche Hypothekenbank Frankfurt;
3. Deutsche Kreditbank; and
4. Bayerische Hypotheken-Wechsel Bank A.G.

The Administrator's request for legal fees equal to the statutory fee for administration of the estate is denied. Counsel may petition this Court for reasonable fees to defend any appeal taken from this order through the appellate courts of Georgia and for services required in completing the administration of the estate.

The Administrator shall, after payment of all claims and expenses as above provided, deliver the remaining property in the hands of the Administrator to Dr. Goerg for determination under German law of the claims of all German creditors, including the claims of the German creditors who have filed claims in Georgia.

SO ORDERED, this 4th day of April, 1990.

/s/ Joel J. Fryer
HONORABLE JOEL J. FRYER
Judge, Fulton Superior Court

APPENDIX G

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D-22830

IN RE: ESTATE OF GUENTER KAUSSEN (DECEASED)

APPLICATION OF EDGARDO PARUNGAO TO PROBATE IN SOLEMN FORM THE ALLEGED WILL OF GUENTER KAUSSEN, DECEASED, AND FOR THE ISSUANCE OF LETTERS OF ADMINITRATION WITH WILL ANNEXED

DR. KLAUS HUBERT GOERG'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

[Filed 12-1-89]

In support of his motion for summary judgment, Dr. Klaus Hubert Goerg ("Dr. Goerg") submits the following statement of material facts as to which there are no genuine issues to be tried:

1.

Heinz Guenter Kaussen ("Kaussen") died on or about April 14, 1985, in Cologne, West Germany. Residing with him on the date of his death in Cologne were his "life companion" Mrs. Ingeborg Skowronek and their four children. (Affidavit of Dr. Klaus Hubert Goerg in Support of Motion for Summary Judgment, ¶ 2) (hereinafter "Goerg Aff.").

2.

At the time of his death, Kaussen was a citizen and resident of the Federal Republic of Germany ("West

Germany"), and his estate consisted primarily of assets located in West Germany. His estate also included assets located in Ireland, Canada, Georgia and California. The majority of his creditors, both in number and monetary amount, were located in West Germany. (Goerg Aff., ¶ 3).

3.

Under West German succession law the heirs of a deceased immediately succeed upon death to the decedent's assets and liabilities without the necessity of initiating any probate administration. Mrs. Skowronek was the sole heir of Kaussen under a one paragraph handwritten will. On May 28, 1985, the Cologne Local Court issued a probate certificate recognizing Mrs. Skowronek as the sole heir. Having been unsuccessful in making appropriate arrangements with Kaussen's creditors and as the successor to his assets and liabilities, Mrs. Skowronek applied to the court for an administration of the estate. On July 17, 1985, the Cologne Local Court ordered the administration of the Kaussen estate and appointed Herman Haeck administrator and Karl-Heinz Maus as joint administrator. (Goerg Aff., ¶ 4).

4

One of the duties of an administrator under West German law is to determine if the estate is insolvent and if so, to commence bankruptcy proceedings pursuant to the German Bankruptcy Code. On November 13, 1985, the two administrators petitioned the Cologne Local Court for the opening of bankruptcy proceedings on the basis that the Kaussen estate was insolvent. On November 15, 1985, the court ordered the estate sequestered and appointed Dr. Klaus Hubert Goerg as sequestrator. (Goerg Aff., ¶ 5). A true and correct copy of the order, along with an English translation, is attached as Exhibit A to the Affidavit of Klaus Hubert Goerg, which has been filed in support of the Motion for Summary Judgment. These

issues were adjudicated in the regular manner in Germany, and the Cologne Local Court had jurisdiction to order the estate sequestered and appoint Dr. Goerg.

5.

The principal duty of a sequestrator is to determine whether the estate is insolvent. The November 15, 1985, court order included in the sequestration all assets of the estate wherever located. Mrs. Skowronek objected to the inclusion of the assets located in Canada, Georgia and California on the basis that they were not part of the German estate and that probate administrations were already pending in those jurisdictions. The Cologne Local Court rejected the objections of Mrs. Skowronek and by order dated December 18, 1985, ruled that the foreign assets, (those located outside of West Germany), belong to the estate, were included in the prior sequestration order, and that disposition of the foreign assets could not be taken without the consent of Dr. Goerg. (Goerg Aff., ¶ 6). A true and correct copy of the order, along with an English translation is attached as Exhibit B to the Affidavit of Dr. Goerg. These issues were adjudicated in the regular manner in Germany, and the Cologne Local Court had jurisdiction to enter this order.

6.

West Germany is a country with modern jurisprudence whose laws and judicial system are in harmony with the fundamental concepts of justice recognized by U.S. law.

7.

Mrs. Skowronek appealed the December 18, 1985, order to the Cologne Regional Court. In her appeal she argued that the sequestration should not include the foreign assets because such assets were not part of the German estate and because there were pending probate administrations in those jurisdictions. The Cologne Regional

Court rejected Mrs. Skowronek's arguments and held that under the principle of universality and in accordance with Section 1 of the German Bankruptcy Code the estate included the foreign property and that such property was subject to the prior sequestration order. (Goerg Aff., ¶ 7). A true and correct copy of the decision, including an English translation, is attached as Exhibit C to the Affidavit of Dr. Goerg.

8.

On January 24, 1986, following a proceeding contested by Mrs. Skowronek and over her objection, the Bankruptcy Division of the Cologne Local Court rendered an order adjudicating the Kaussen estate insolvent and appointing Dr. Goerg as bankruptcy trustee. The order, in accordance with the provisions of the German Bankruptcy Code, gave Dr. Goerg authority to take possession of all property belonging to the Kaussen estate, including foreign property, and to liquidate the property for the benefit of the creditors worldwide. In response to Mrs. Skowronek's objection that foreign assets should not be included in the bankruptcy and that there were probate proceedings pending abroad, the court directed Mrs. Skowronek and any heirs recognized under the legal system of a foreign country, and administrators of foreign proceedings, to grant to Dr. Goerg as the bankruptcy trustee appropriate powers of attorney permitting him under the laws of the respective states of situs to take possession of the deceaseed's property located abroad. The court specifically noted that the German bankruptcy included the proceeds of property located abroad regardless of the fact that a special administration had been commenced in the foreign country. (Goerg Aff., ¶ 8). A true and correct copy of the order, including an English translation is attached as Exhibit D to the Affidavit of Dr. Goerg.

9.

The January 24, 1986, order of the Cologne Local Court was affirmed on appeal by the Cologne Regional

Court on February 17, 1986, and by the Cologne Higher Regional Court of Appeals on March 3, 1986, and April 28, 1986. True and correct copies of these opinions, along with English translations are attached as Exhibits E, F and G to the Affidavit of Dr. Goerg. The Federal German Constitutional Court on June 6, 1986, refused to review the matter, finding the constitutional challenge without merit. (Goerg Aff., ¶ 9). A true and correct copy of the order of the Federal German Constitutional Court, along with an English translation is attached as Exhibit H to the Affidavit of Dr. Goerg.

10.

In affirming the Cologne Local Court's order, the Cologne Higher Regional Court, the court of last resort for nonconstitutional questions, ruled that the foreign property constituted part of the German bankruptcy under the principle of "universality" and that the foreign property shall be placed in the custody of and used by the trustee, Dr. Goerg. As in the earlier proceedings Mrs. Skowronek, who had appealed the matter to the Cologne Regional Higher Court, argued that the foreign property was not subject to the German bankruptcy, because, in part, there were existing foreign probate administrations. In rejecting her argument the Cologne Regional Higher Court specifically noted that it was appropriate for the lower court to require the debtor to grant a power of attorney regarding the foreign property because of the possibility that a foreign state might not recognize the authority of the German trustee Dr. Goerg. The decision clearly holds that under German law Dr. Goerg has authority to obtain the foreign assets for inclusion in the German bankruptcy. (Goerg Aff., ¶ 10).

11.

In May 1985, a probate administration of Kaussen's Georgia assets was begun in Georgia. Eric Ranney was

originally appointed temporary administrator of the Georgia probate estate on May 31, 1985. On July 17, 1985, Edgardo L. Parungao succeeded Ranney as probate administrator. There is also a probate administration in California and a bankruptcy proceeding in Canada regarding the Kaussen estate. (Affidavit of Douglas W. Duncan filed November 9, 1989, ¶ 2) (hereinafter "Duncan Aff.").

12.

At the time the Georgia probate proceeding was initiated the assets located in Georgia consisted primarily of 21 parcels of real estate. To date all of the Georgia real estate has been sold except one parcel. This parcel is the 800 Peachtree Building and adjoining parking lot. It is currently appraised at $4,200,000.00. It is encumbered by a mortgage of approximately $1,849,000.00 that is due on March 1, 1990. In addition, there is a small mortgage with the remaining balance of $36,371.93. (Duncan Aff., ¶ 3).

13.

As a result of the sale of the property and the disposition of assets the Georgia administrator currently has liquid assets of approximately $6,504,606.00 including $1,148,949.00 due from the California administrator of the Kaussen estate as a result of the refund of FIRPTA funds. (Duncan Aff., ¶ 4).

14.

There have been received by the Georgia administrator 212 claims of creditors domiciled in the United States (hereinafter the "Domestic Claimants") totalling approximately $1,276,255.00. In addition, there are pending litigated claims in the amount of $1,100,000.00 of which $100,000.00 is believed not to be covered by insurance. (Duncan Aff., ¶ 5).

15.

In addition to the claims of Domestic Claimants, West German creditors have filed claims against the Kaussen assets in the Georgia probate proceeding as well. Three German banks, Deutsche Hypothekenbank Frankfurt, Deutsche Kreditbank and Bayerische Hypotheken-Wechsel Bank A.G., have filed claims totalling DM 114,003,286. In addition, Dr. Bruno M. Kubler as the German trustee in bankruptcy for two German corporations which were owned directly or indirectly by Mr. Kaussen and Mrs. Skowronek but which assert claims against the estate, has filed a claim in the amount of DM 71,828,974. The three German banks and Dr. Kubler have also filed the same claims in the California probate proceeding and in the Canadian bankruptcy, where they are contested in part and are being litigated. (Duncan Aff., ¶ 6).

16.

Dr. Kubler and the three German banks first filed their claims in the German bankruptcy proceeding and only later asserted the same claims in Georgia, California and Canada. As the result of an objection asserted by the heirs regarding the standing of Dr. Goerg in the Georgia probate proceeding, Dr. Goerg filed the claims of the three German banks with the Georgia administrator in June 1986 pursuant to an agreement with the banks that they would assist him in recovering the estate located in Georgia. Pursuant to the agreement, Dr. Goerg and the three German banks took the position that Dr. Goerg was entitled as the German bankruptcy trustee to recover the Kaussen assets located in Georgia but that if the Georgia courts did not recognize the standing of Dr. Goerg, the three German banks would pursue their claims as creditors. Dr. Goerg and the three German banks each agreed that if assets were recovered by the banks in Georgia the assets would be turned over to Dr. Goerg as trustee to the German bankruptcy. In the fall of 1988, however,

Bayerische Hypotheken-Wechsel Bank ("Hypo Bank") hired separate counsel, changed its position to assert that it was entitled to collect as a creditor in Georgia instead of Dr. Goerg, and indicated that it did not intend to turn over any recovered assets to the German bankruptcy. (Goerg Aff., ¶¶ 13-14).

17.

The claims of Dr. Kubler and the three German banks all arise from transactions that occurred in Germany, are governed by German law, and if litigated all of the evidence will be from witnesses and documents located in Germany and all of the written evidence is in the German language. The claims of the German banks arise out of certain secured loans made by the banks to the decedent. Since the time of the filing of the claims the German property securing the loans had been sold and the proceeds applied to the indebtedness. The amount of the deficiencies after the sale of the properties, and in particular the appropriate calculation of interest, is disputed by the German bankruptcy trustee Dr. Goerg. The resolution of the dispute presents a complicated and difficult issue of German bankruptcy law. If the dispute is tried it probably will require the testimony of numerous witnesses located in West Germany and the introduction of thousands of pages of documents written in the German language. (Goerg Aff., ¶ 16; Duncan Aff., ¶¶ 7-8).

18.

As indicated above, Dr. Kubler is the German bankruptcy trustee of two corporations owned directly or indirectly by the decedent and his life companion Mrs. Skowronek. The stock in the two corporations is included in the assets of the bankrupt estate, but Dr. Kubler as the trustee has asserted claims against the estate. Dr. Goerg has acknowledged DM 10,000,000 and contested the balance of the claims. Dr. Kubler's lawsuit against Dr.

Goerg regarding the balance of the claims was dismissed by the court of the first instance on May 5, 1989, on the basis that the claims were not valid. True and correct copies, including English translations, of the decisions dismissing Dr. Kubler's claims are attached as Exhibit I to the Affidavit of Dr. Goerg. Dr. Kubler has appealed the decisions of the court of first instance. The final resolution of Dr. Kubler's claims presents complicated and difficult issues of German law which may not be finally resolved in appeal for another three to four years. (Goerg Aff., ¶ 17).

19.

As indicated above Dr. Goerg was appointed trustee in bankruptcy on January 24, 1986. He prepared and submitted a written report dated March 6, 1986, for the first meeting of creditors to be held on March 7, 1986. In the written report Dr. Goerg estimated the fair market value of the worldwide assets to be DM 279,987,000 and that the liabilities were DM 401,622,000. Virtually all of the bankrupt estate's property in West Germany has now been sold. The proceeds from the sales were approximately DM 220,000,000 approximately DM 20,000,000 was retained by the trustee in bankruptcy and the balance was paid to secured creditors as the relevant properties were sold. (Goerg Aff., ¶ 18).

20.

The remaining asserted unpaid claims of creditors in the German bankruptcy total approximately DM 148,000,000. The figure includes the claims of several German tax authorities in the approximate amount of DM 54,000,000. The tax authorities have asserted that their claims take priority under German bankruptcy law over other unsecured creditors. Dr. Goerg has proposed to the tax authorities that they waive their claims for priority in regard to assets obtained abroad. The state and federal tax authorities tentatively have agreed to

such a waiver. Dr. Goerg expects to receive written confirmation of an unconditional waiver from all tax authorities within the next 90 days. In addition, the municipal tax authority (City of Cologne) has agreed to waive its priority to assets coming from abroad as well. (Goerg Aff., ¶ 19).

21.

Paragraphs 12 and 14 of the German Bankruptcy Code prohibits creditors, such as Hypo Bank and Dr. Kubler, of the bankrupt estate from executing on or collecting their claims outside the bankruptcy proceeding to the detriment of other creditors. The purpose of the paragraphs is to prevent unjust enrichment and unequal treatment of creditors. (Goerg Aff., ¶ 20).

22.

Although the Kaussen estate on a worldwide basis and in West Germany is overindebted, the Kaussen assets located in Georgia substantially exceed the claims of Domestic Claimants. The assets located in California and Canada also substantially exceed the claims of the respective domestic creditors in those jurisdictions. The vast majority of the German creditors in the German bankruptcy have not filed claims in Georgia and probably are precluded from filing claims in California because of the expiration of the relevant statute of limitations. If Hypo Bank and Dr. Kubler are allowed to recover on their claims in the Georgia probate proceeding rather than paying the net assets to the German bankruptcy trustee, Dr. Goerg, they will obtain a greater share of their claims than they will receive if they are limited to pursuing their claims in the German bankruptcy and they will receive a greater share of their claims than the other similar situated German creditors who have not filed claims in Georgia. (Goerg Aff., ¶ 21).

23.

Dr. Kubler and Hypo Bank seek pro rata payment of their claims in accordance with the Georgia priority statute O.C.G.A. § 53-7-91. Pro rata payment cannot be made without determining the validity of and the exact amount of their claims. Their claims are disputed in part and already are being litigated in Germany and in California. Thus, pro rata payment would either require relitigation in Georgia of matters being litigated in other courts or would delay the payment of claims, including the claims of Domestic Claimants, for years pending the final resolution of the foreign litigation. (Duncan Aff., ¶ 14). Moreover, to base pro rata payment solely on the distribution and claims filed in Georgia, without regard to payments to be received in California and Canada, could result in payments to Hypo Bank and Dr. Kubler in excess of their enforceable claims. If instead their claims are reduced by recovery received or to be received elsewhere, or then the distribution of the Georgia assets, including payments and Domestic Claimants, must await the determination of the amount of claims and payments to be received in Germany, Canada and California.

KILPATRICK & CODY

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APPENDIX H

IN THE SUPREME COURT OF GEORGIA

S90A1633

HYPOBANK *et al.*

v.

PARUNGAO *et al.*

S90A1634

KUBLER *et al.*

v.

PARUNGAO *et al.*

Decided: Jan. 10, 1991

PER CURIAM.

Judgment affirmed without opinion pursuant to Rule 59. *All the Justices concur.*

APPENDIX I

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

Case No. S90A1633

IN RE: ESTATE OF GUENTER KAUSSEN, DECEASED,

BAYERISCHE HYPOTHEKEN-UND
WECHSEL-BANK AG ("HYPOBANK"),
Appellant.

Case No. S90A1634

BRUNO M. KUBLER, Trustee in Bankruptcy for Westaufbau GmBH, and Westaufbau Grundbesitzanlagen GmBH & Company, KG, Pursuant to the Laws of the Federal Republic of Germany,
Appellant,

v.

EDGARDO L. PARUNGAO, *et al.*,
Appellees.

From the Superior Court
of Fulton County
No. D-22830

RESPONSE OF
APPELLEE DR. KLAUS HUBERT GOERG
TO JOINT MOTION FOR REHEARING

This case arises out of the administration of the insolvent estate of Heinz Guenter Kaussen, a German de-

cedent, in the Probate Court of Fulton County Georgia. Both the Georgia probate administrator, appellee Edgardo L. Parungao, and the German bankruptcy trustee, appellee Dr. Klaus Hubert Goerg, sought and obtained a summary judgment in the Superior Court of Fulton County declaring that the assets remaining after the payment of Georgia creditors be turned over to Dr. Goerg pursuant to the prior orders of the German courts. After extensive briefing by the parties and oral argument, this court on January 10, 1991, entered a per curiam opinion affirming the judgment below pursuant to Rule 59 with all the justices concurring. Appellants HypoBank and Dr. Kubler have now filed a joint motion for rehearing and a brief in support of the motion. Appellee Dr. Goerg files this brief response to the joint motion and supporting brief.

Although appellants HypoBank and Dr. Kubler assert, as is required by Rule 47 of the rules of the Supreme Court of Georgia, that the Court overlooked a material fact in the record, a statute, or a decision which is controlling authority and which would require a different judgment, they fail to cite a single material fact which has been overlooked or refer the Court to any controlling authority which would require a different judgment. Rather, they merely repeat the arguments made in their prior briefs. It is not Dr. Goerg's intention to repeat herein all of the prior arguments made in response. Rather, it is sufficient to point out that the fundamental issue in the case is whether the trial court properly granted comity to the German judgments. This Court's decision affirming the summary judgment in affect affirms the grant of comity to the German judgments. If comity is granted to the German judgments then the arguments repeated in the motion and brief are not applicable.

As was extensively argued in Dr. Goerg's prior brief, granting comity to the West German orders and direct-

ing administrator Parungao to turn over the net Kaussen assets is not in violation of the equal protection clause or any treaty between the United States and West Germany. The fallacy of the appellants' argument is that it is not discriminatory, nor is it unequal treatment, for a Georgia court to recognize and enforce a foreign judgment, merely because the result might be different for the differently situated foreign claimant under their own law than it would be if U.S. law governed. The same reasoning is applicable to their argument that a Georgia statute wou require a different result. The fact is that under conflict of law principles the Georgia statute is not the governing law. The recognition of the foreign judgments and the application of foreign law to foreign claimants whose claims arise under foreign law is nothing more than the neutral application of legal principles.

The other major argument made in appellants brief is that Rule 59 is not applicable. HypoBank and Dr. Kubler contend that the evidence does not support the judgment because the court below did not render any specific findings of fact. Appellants argument totally ignores that they failed to create any disputed issue of material fact below because they failed to offer any admissible evidence which contradicted in any way Dr. Goerg's statement of material facts. The sum and substance of HypoBank and Dr. Kubler's argument in the motion for rehearing is the novel proposition that a trial court cannot grant summary judgment without entering findings of fact because "all facts must be construed in the best light for appellants." Neither Rule 56 nor any case interpreting it requires that a court enter findings of fact in order to grant a motion for summary judgment.

The additional arguments made by appellants in their motion and brief also are mere repetitions of their prior briefs without any further discussion or citation of authority. Because appellants HypoBank and Dr. Kubler have failed to demonstrate that the Court overlooked any

material fact or relevant authority, its motion for rehearing should be denied.

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APPENDIX J

SUPREME COURT OF GEORGIA

ATLANTA—JANUARY 30, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A1634

BRUNO M. KUBLER *et al.*

v.

EDGARDO PARUNGAO *et al.*

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

JOLINE B. WILLIAMS, Clerk.

APPENDIX K

SUPREME COURT OF GEORGIA

ATLANTA—JANUARY 31, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A1633

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK *et al.*

v.

EDGARDO PARUNGAO *et al.*

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

JOLINE B. WILLIAMS, Clerk.

APPENDIX L

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-8680

IN RE DR. KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the Estate of Heinz Guenter Kaussen, pursuant to the laws of the Federal Republic of Germany, DEBTOR.

DR. KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the Estate of Heinz Guenter Kaussen, pursuant to the laws of the Federal Republic of Germany,
Appellant,

v.

EDGARDO L. PARUNGAO, JOHN F. SAMPSON, DR. BRUNO M. KUBLER, BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK AD, and JAMES R. KANNER, GUARDIAN AD LITEM for the Minor Child, EVA MARIE KAUSSEN,
Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

May 13, 1991

Before JOHNSON and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JOHNSON, Circuit Judge:

Appellant-trustee Klaus Hubert Goerg appeals the district court's finding that the bankruptcy court had the

authority to enter an unreviewable abstention order pursuant to 11 U.S.C. § 305(c).

I. STATEMENT OF THE CASE

A. *Background Facts*

This case involves the administration of the estate of Heinz Guenter Kaussen, a citizen of West Germany, who died in April 1985 leaving liabilities of approximately $55 million in excess of his assets. After Kaussen's death, the Cologne Local Court, the West German local court with jurisdiction, entered an order of adjudication finding Kaussen's estate insolvent. The West German court appointed Goerg as trustee in bankruptcy. Goerg then sought to collect all of Kaussen's assets, which were located in West Germany, Ireland, Canada, Georgia, and California, to administer them in one plenary proceeding in West Germany.[1]

B. *Procedural History*

To obtain control over Kaussen's assets in the United States, Goerg filed petitions for ancillary administration of the Kaussen estate in the bankruptcy courts for the Northern District of California and the Northern District of Georgia pursuant to 11 U.S.C. § 304.[2] In both petitions, Goerg requested that the bankruptcy courts recognize and enforce the Order of the Cologne Local Court, which he claimed exclusively authorized him to collect Kaussen's foreign assets and return them to Germany for administration in one proceeding.

The Georgia bankruptcy court initially denied Goerg's section 304 petition, finding that it had no jurisdiction

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[1] The parties dispute whether the West German court directed Goerg to collect all of Kaussen's assets.

[2] Section 304 governs cases filed in bankruptcy courts that are related to foreign bankruptcy proceedings, *e.g.*, where a foreign debtor has assets in this country. 1 1U.S.C. § 304.

because Goerg was the representative of a foreign decedent's estate and a decedent's estate could not be a debtor under the Bankruptcy Code. *In re Goerg*, 64 B.R. 321, 324 (Bankr.N.D.Ga.1986). The district court affirmed the bankruptcy court. We reversed the district court, however, and held "that a debtor in a section 304 proceeding need not qualify as a 'debtor' under the Code's definition of that term [but must] only be properly subject, under applicable foreign law, to a proceeding 'commenced for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.'" *In re Goerg*, 844 F.2d 1562, 1568 (11th Cir.1988).

Goerg then filed an "Amended and Restated Petition for Section 304 Relief" in the bankruptcy court. Appellee-creditors Bruno M. Kubler and Bayerische Hypotheken-Und Wechsel-Bank AG ("HypoBank") (collectively "the creditors") opposed the petition. On July 31, 1989, the bankruptcy court entered an order abstaining from or, alternatively, dismissing jurisdiction pursuant to 11 U.S.C. § 305. Goerg appealed to the district court. The district court dismissed the appeal on the grounds that the bankruptcy court's abstention order was nonreviewable.[3] In this appeal, Goerg argues that the bankruptcy court's issuance of a nonreviewable section 305 order to abstain or, alternatively, to dismiss jurisdiction violates Article III and is therefore unconstitutional.

II. ANALYSIS

Determinations of law by a district court are subject to *de novo* review by this Court. *In re Sublett*, 895 F.2d 1381, 1383 (11th Cir.1990).

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[3] At the time the district court considered this appeal, section 305(c) stated that an order "dismissing a case or suspending all proceedings in a case, or a decision not to so dismiss or suspend, is not reviewable by appeal or otherwise." 11 U.S.C.A. § 305(c) (West 1979).

A. *Reviewability of the Section 305 Order to Abstain*

In our recent opinion in *Parklane v. Parklane*, 927 F.2d 532, 538 (11th Cir. 1991), we determined that an Article I bankruptcy court may not issue an unreviewable section 305 order to dismiss or, alternatively, to abstain from jurisdiction over a bankruptcy case.[4] This Court noted that original jurisdiction over bankruptcy cases is vested in Article III courts and that bankruptcy courts obtain jurisdiction only at the discretion of the district court, *Id.; see also* 28 U.S.C. § 1334(a), (b) *and* 28 U.S.C. §§ 151 & 157. In view of the Supreme Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 548 (1982), we ruled that permitting a bankruptcy court to issue an unreviewable section 305 order dismissing or suspending a district court's jurisdiction over a bankruptcy case would violate Article III of the Constitution by impermissibly placing the jurisdiction of an Article III court within the unreviewable discretion of an Article I court. The appellees' briefs have raised no new arguments which would suggest that this conclusion was incorrect.

In fact, Congress' recent amendment to section 305 supports this Court's ruling in *Parklane*. Section 305(c) now states, in part, that an order under "this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise *by the court of appeals under section 157(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.*" Federal Courts Study Committee Implementation Act of 1990, Pub.L. 101-650, § 309, 104 Stat. 5113

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[4] At the time we heard the argument in *Parklane, supra*, section 305(c) had not yet been amended. *See* Federal Courts Study Committee Implementation Act of 1990, Pub.L. 101-650, § 309, 104 5113 (Dec. 1, 1990).

(Dec. 1, 1990) (amendment in italics).[5] By omitting any reference to the district courts in the amendment, Congress limited only the jurisdiction of the Court of Appeals and the Supreme Court to review a bankruptcy court's section 305 order, but not the jurisdiction of the district court to review such an order. *See In re Axona Int'l Credit & Commerce Ltd.*, 924 F.2d 31 (2ndCir. 1991).

B. *The District Court's Standard of Review of a Bankruptcy Court's Section 305 Order*

Goerg argues that this Court should hold that the district court must review a bankruptcy court's section 305 order at a *de novo* hearing. Moreover, he claims that this review should require the district court to provide the parties with the opportunity to submit additional evidence not presented before the bankruptcy court. The creditors contend that the district court should subject the bankruptcy court's factual findings to the clearly erroneous standard of review while reviewing questions of law *de novo*.[6]

Section 157(b)(1) of Title 28 states that "Bankruptcy Judges may hear *and determine all cases* under title 11 . . . referred to [them] under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. § 157(b)(1) (emphasis added). Accordingly, a bankruptcy court's section 305 order, which is a determination of whether to dismiss or abstain from a case under

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[5] The identical language was inserted as an amendment to 28 U.S.C. § 1334(c)(2), which governs the jurisdiction of district courts over bankruptcy cases and proceedings.

[6] Because the district court in *Parklane* withdrew reference of the case from the bankruptcy court before the bankruptcy court entered a section 305 order, we did not address the question of the standard of review the district court should apply to a bankruptcy court order under section 305.

title 11, is subject to review pursuant to 28 U.S.C. § 158(a).[7] Appeals brought pursuant to this section "shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules." 28 U.S.C. § 158(c). In a bankruptcy appeal, a district court will subject the bankruptcy court's determinations of law to *de novo* review. *In re Sublett*, 895 F.2d 1381, 1383 (11th Cir.1990). The district court will apply the "clearly erroneous" standard of review to the bankruptcy court's factual findings. *Id.*; Bankr.Rule 7052 (incorporating Fed.R.Civ.P. 52); Bankr. Rule 8013. The district court is not authorized to make independent factual findings; that is the function of the bankruptcy court. *In re Sublett*, 895 F.2d at 1383 (citing Bankr.Rules 7052, 8013, and *Wegner v. Grunewaldt*, 821 F.2d 1317, 1320 (8th Cir.1987)). If the bankruptcy court's factual findings are ambiguous or silent as to an outcome-determinative factual question, the district court must remand the case to the bankruptcy court. *Id.* The drafters of the amendment to section 305 clearly intended that in most cases the bankruptcy court should make the initial determination of whether to issue a section 305 order.[8] *See Report of the Federal Courts Study Committee*, part II, p. 77, part III, pp. 371-374.[9]

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[7] Section 158(a) provides that the "district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." 28 U.S.C. § 158(a).

[8] Of course, a district court may choose to withdraw the reference of a bankruptcy case from a bankruptcy court in order to consider a section 305 order. *See Parklane, supra.*

[9] Congress established the Federal Courts Study Committee in 1988. Federal Courts Study Act, Pub.L. No. 100-702, § 102, 102 Stat. 4644 (1988). The Committee's duties included reporting to the President and Congress, among others, suggested revisions to the laws of the United States.

The Committee recognized that in most cases the decision to abstain from a bankruptcy case turns on considerations unique to bankruptcy law and thus is especially suited for the expertise of the bankruptcy court. *Id.*

III. CONCLUSION

For the foregoing reasons, we REVERSE and REMAND to the district court.

No. 90-1741

FILED
JUN 3 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK AG

and

DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,

Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany,

and

EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

---

RESPONDENT PARUNGAO'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether payment of substantially all claims other than Petitioners' renders moot constitutional contentions regarding equal protection.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1741

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK AG

and

DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,

Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany,

and

EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

---

RESPONDENT PARUNGAO'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

O.C.G.A. § 5-6-10. Transmittal of remittitur to lower court generally.

> "The decision of the appellate court and any direction awarded in the case shall be certified by the clerk to the court below, under the seal of the court.

> The decision and direction shall be respected and carried into full effect in good faith by the court below. The remittitur shall contain nothing more, except the costs paid in the appellate court."

STATEMENT OF THE CASE

Events Subsequent to the Decision

Following the Georgia Supreme Court decision affirming, without opinion, the Respondents' Motions for Summary Judgment, Petitioners did not seek to stay the remittiturs.[1] In due course on February 12, 1991, the remittiturs from the Georgia Supreme Court were made the order of the trial court. (See Appendix, pp. 1a and 2a.) Subsequently, Petitioners have not sought any stay in the trial court nor in this Court.

During the intervening three and a half months, Parungao has implemented the final, unstayed judgment directing him to pay all valid claims in amounts allowed by him except those of Petitioners and the two other German banks which did not oppose or appeal the grant of summary judgment. Of a total of 241 claims filed, excluding the Petitioners', 230 have been paid. The remaining eleven claims will be settled and paid imminently.

REASONS FOR DENYING THE WRIT

I. MOOTNESS RENDERS NON-JUSTICIABLE PETITIONERS' CLAIMS

The summary judgment granted Respondents to which Petitioners object directs payments of all valid claims ex-

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[1] Rule 61 of the Georgia Supreme Court Rules provides:

> "Any party desiring to have the remittitur stayed in this court in order to appeal or seek a writ of certiorari in the United States Supreme Court shall file in this court motion to stay the remittitur with a concise statement of the issues to be raised on appeal or in the petition for certiorari. Such notice shall be filed at the time of filing a motion for rehearing, or if no motion for rehearing is filed, within the time allowed for the filing of same."

cept those of Petitioners and two other non-objecting German banks.[2] The thrust of Petitioner's constitutional claim to denial of equal protection is directed to the payment of domestic claims in advance of those of Petitioners. This argument is now moot.

When the Petitioners failed to inform the Georgia Supreme Court of their intention to seek certiorari and request it to withhold its remittiturs, as provided by Rule 61 of the rules of that Court, the remittiturs were transmitted to the trial court and made its Order on February 12, 1991. (See Appendix, pp. 1a and 2a.) Georgia law directs that the Appellate decision ". . . shall be respected and carried into full effect in good faith . . . ." O.C.G.A. § 5-6-10.

During the intervening three and a half months, Parungao has followed the order directing him, first, to pay in full all valid claims filed with him except those of Petitioners. Of 241 of such claims filed, 230 have been paid.

Even if Petitioners' constitutional claim for equal protection had been properly raised, it is moot. Petitioners stood idly by while Parungao discharged his fiduciary duty as directed by the trial court.

There is no justiciable controversy before this Court applicable to Petitioners' equal protection claim. In *Burke v. Barnes*, 579 U.S. 361, 363 (1987), this Court held:

> Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides a case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing.

The only aspect of the summary judgment order remaining to be discharged is the direction to Parungao to deliver the net proceeds to Dr. Gorg for determination under German law of the claims of all German creditors,

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[2] See Appendix C, at Page 18a, Petition for Writ of Certiorari.

including Petitioners'. That direction raises no federal case for review by this Court.

II. PETITIONERS HAVE FAILED TO DEMONSTRATE THE EXISTENCE OF A SUBSTANTIAL FEDERAL QUESTION THAT WAS PROPERLY RAISED, PRESENTED AND PURSUED IN THE STATE COURTS BELOW

Petitioner Parungao adopts and endorses the argument set forth in the brief filed by Respondent Dr. Gorg.

III. THE AFFIRMING ORDER AND THE JUDGMENT ARE BASED UPON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS, MAKING REVIEW BY THIS COURT UNNECESSARY AND INAPPROPRIATE

Petitioner Parungao adopts and endorses the argument set forth in the brief filed by Respondent Dr. Gorg.

CONCLUSION

The direction of the Georgia court to which Petitioners attempt to raise constitutional claims having been obeyed by Parungao, there is no justiciable controversy involving a federal question presented by the Petition for Certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF GEORGIA
Atlanta, January 10, 1991

The honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A1634

BRUNO M. KUBLER *et al.*

v.

EDGARDO PARUNGAO *et al.*

This case came before this Court upon an appeal from the Superior Court of Fulton County and, after argument had, it is considered and adjudged that the judgment of the Court below

Affirmed without opinion.

All justices concur.

It is ordered that the judgment of the Supreme Court of Georgia in the within stated case be and the same is hereby made the judgment of this Court.

This 12th day of February, 1991.

/s/ Joel J. Fryer
Judge, Fulton Superior Court
A.J.C.

SUPREME COURT OF GEORGIA
Atlanta, January 10, 1991

The honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A1633

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK *et al.*

v.

EDGARDO PARUNGAO *et al.*

This case came before this Court upon an appeal from the Superior Court of Fulton County and, after argument had, it is considered and adjudged that the judgment of the Court below

Affirmed without opinion.

All justices concur.

It is ordered that the judgment of the Supreme Court of Georgia in the within stated case be and the same is hereby made the judgment of this Court.

This 12th day of February, 1991.

/s/ Joel J. Fryer
Judge, Fulton Superior Court
A.J.C.

Supreme Court, U.S.
FILED
JUN 10 1991
OFFICE OF THE CLERK

No. 90-1741

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BAYERISCHE HYPOTHEKEN- UND WECHSEL- BANK AG
and
DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,
Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany, and EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Georgia

PETITIONERS' REPLY BRIEF

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Contrary to Respondents' assertion, the Order of the Superior Court of Fulton County, Georgia, and the affirmance thereof by the Supreme Court of Georgia did not rest upon any adequate and independent state grounds. Rather, the courts below necessarily either (1) ignored completely the substantial federal questions properly raised by Petitioners or (2) decided that the alienage-based discrimination mandated by the Order was not violative of the Fourteenth Amendment's guarantee of equal protection and that violation of the Treaty at issue was subordinate to the whims of the trial court. Despite Dr. Görg's protestations, the type of alienage-based discrimination found in this case is clearly prohibited by this Court's established precedent.

I. THE ORDERS BELOW DO NOT REST UPON ANY ADEQUATE AND INDEPENDENT STATE GROUNDS.

A. Petitioners Properly Raised, Presented and Pursued Their Substantial Federal Challenges Below.

The essence of Respondents' response on this issue is that because Petitioners relied on the certified transcript of the bankruptcy court trial on Dr. Görg's section 304 petition in rebutting his statement of material facts below rather than obtaining new affidavits from the same witnesses as to the same issues, therefore somehow Petitioners failed to raise their federal questions properly. However, Respondent Görg admits that Petitioners did raise the federal issues below. *See* Respondent Görg's Brief in Opposition, at 12. Nonetheless, Respondents assert that the Petitioners' use of that transcript did not comply with Georgia law and that such non-compliance provided an independent and adequate state law ground for the decisions below. These arguments are simply wrong.

First, Respondents clearly waived any possible objection to the transcript (and any other evidence) by failing to object when such evidence was submitted to the trial court. *See Chapman v. McClelland*, 248 Ga. 725 (1982); *Perry v. International Indemnity Co.*, 169 Ga. App. 818 (1984)("There is no more fundamental principle of appellate review than that preventing consideration of evidentiary objections not raised before the trial court and contained in the record on appeal.") Second, in opposition to a summary judgment motion, Georgia courts consider all papers of record, regardless of whether the papers have been formally introduced into evidence. *See Bimbo Builders v. Stubbs Properties*, 158 Ga. App. 280 (1981); *Jackson v. Couch Funeral Home*, 131 Ga. App. 695 (1974). The transcript was unquestionably properly before the courts below, Petitioners having complied with applicable procedural requirements.

B. Comity Was Not And Could Not Be An Adequate and Independent Basis For The Decisions Below.

Seeking another out, Respondents argue strenuously that the trial court based its Order on recognition of German court orders under the doctrine of comity, that being an independent and adequate state ground. This position is obviously fanciful because it ignores two critical but quite obviously contrary facts from the record below. First, neither the trial court nor the Georgia Supreme Court makes any mention whatsoever of comity or the German court orders. Second, and more significant, the United States Bankruptcy Court for the Northern District of Georgia, in the trial of Dr. Görg's section 304 petition (the transcript of which was properly submitted to the trial court herein and the rulings of which are attached to the Petition) found that considerations of comity would dictate the opposite result from that reached by the Order below. The bankruptcy court found that German law recognized the right of the

Georgia courts to administer estate property located in Georgia in accordance with Georgia law and that Dr. Görg's authority was thus circumscribed by the laws of his own country and by the terms of the very order appointing him as Trustee.

Because the Georgia Supreme Court decided this case without a written opinion setting forth the basis for its decision, and because Petitioners raised federal issues before that court, that decision is one that "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and is therefore subject to review by this Court. *Michigan v. Long,* 463 U.S. 1032, 1040 (1983). As this Court made clear in *Long*, where it is unclear whether a state court's decision rests upon state or federal grounds and both have been raised, there is a presumption that the federal question was necessary to the decision and thus this Court's review is appropriate. *Id.* This Court should not follow Dr. Görg's musings as to the basis for the Georgia Supreme Court's decision, but rather should assume that the federal questions raised constituted a basis for that decision.

II. THE TRIAL COURT'S ORDER MANDATES ALIENAGE-BASED DISCRIMINATION WHICH INFRINGES PETITIONERS' RIGHTS TO EQUAL PROTECTION.

The trial court's Order discriminates against Petitioners (and others similarly situated) based solely on the fact that Petitioners are German nationals. That basis is explicit and intentional; it is expressed by the very terms of the Order, which single out German nationals to be excluded from the statutory distribution scheme of O.C.G.A. § 53-7-91. The trial court stated: "The Administrator is directed to pay in full all valid claims filed with the Administrator ... except that the Administrator shall not pay any amounts on the following claims: [lists four German claimants]." As

this Court made clear in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977), "[w]hen there has been proof that a discriminatory purpose has been a motivating factor in the decision, ... judicial deference is no longer justified." The proof of the trial court's intent is the express language of the Order. No more showing is required. This blatant and embarrassing abuse should be reversed with emphasis.

Respectfully submitted,

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